NO. 88-1921

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In the
Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, AND THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is a Defamatory and Intrusive Investigation of a Private Citizen Conducted by a Town Manager, and a Police Officer Under his Command, Performed "Under Color Of" Law?

II. Does Application of First Amendment "De Novo" Review Permit an Appellate Court to Substitute its Own Credibility Calls and Subsidiary Factfindings for Those Made by a Reasonable Jury, and Does De Novo Review Apply at all Where the Jury's Finding Supports the Norm of Free Political Speech?

III. Does a Citizen who Writes Newspaper Articles Criticizing Government Thereby Become a "General Purpose Public Figure" Open to a Government Official's Retaliation With Lies and False Rumors Regarding the Citizen's Past Personal Life?

IV. Is a Town Manager, who is the Town's Chief Administrative Officer and Chief Law Enforcement Officer, a Policymaker for Purposes of 42 U.S.C. §1983?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding immediately below are contained in the caption. Claims against a defendant in the original action, James Tice, were dismissed.

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CITATION TO OPINION BELOW

Morgan v. Tice, 862 F.2d 1495 (11th Cir. 1989).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit reversed the jury verdict and dictrict court judgment on January 11, 1989, see Morgan v. Tice, 862 F.2d 1495 (11th Cir. 1989) (hereinafter cited "Appendix [App.]" 3).

Morgan's petition for rehearing and suggestion for rehearing en banc was denied, and the denial was filed on February 27, 1989. App. 1.

This Court has jurisdiction to grant certiorari in this case pursuant to 28 U.S.C. § 1254(1) and Sup. Ct. Rule 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I:

Congress shall make no law . . . abridging the the freedom of speech, or of the press. . . .

U.S. Const. amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner Frank Morgan moved to the Town of Lake Park, Florida, in 1978 from Pennsylvania. App. 3, 7. In March 1982, Morgan first met Respondent Dennis Whitt, who was then the Town Manager, chief administrative officer, and chief law enforcement officer for Respondent Lake Park. App. 6, 8; Record, Vol. 5, at 34-35 [R5/34-35].

In Lake Park, Morgan criticized various members of the Town Commission and Whitt's performance as Town Manager. The criticisms were delivered both verbally and in a column Morgan wrote in a local weekly newspaper. App. 6.

In 1985, as a direct result of Morgan's newspaper criticism, Whitt decided to travel to Schwenksville, Pennsylvania to investigate Morgan's past, R5/47. This trip was scheduled in conjunction

with a trip to Auburn, New York, where Whitt was investigating the educational background of a Town employee.[1] App. 8-9. It is undisputed that the stop in Pennsylvania added some $400.00 to the airfare, which was paid for by the Town. App. 9-10; R7/505-06.

Before taking the trip, Whitt telephoned the Mayor of Schwenksville, identified himself as the Town Manager of Lake Park, and stated he was looking for background information concerning Morgan, possibly leading to a criminal investigation, R6/295-96. Whitt also placed a call, paid for by the Town, to

1. The rationale offered for the trip to New York was Whitt's need to investigate the truth of a Lake Park Police Department employee's claim that she was a high school graduate, App. 12-13. Lake Park Police Sergeant Tice, noted that verification of the employee's high school graduation could have been obtained by a simple telephone call or letter, R5/94-96, R6/184-86.

the Chairperson of the Schwenksville Town Council, R5/67, R7/503.

Sergeant James Tice of the Lake Park Police Department traveled with Whitt; Tice testified that he accompanied Whitt because he believed he could be disciplined if he refused, R5/102. Tice also testified that Whitt told him the Town Commission knew about the trip, and that Whitt directed him to show his police identification while in Pennsylvania, telling him "that's why I brought you along, because people tell you more when they see I.D." R5/99, 103.

Whitt testified that he went to Pennsylvania "to retrieve information about Mr. Morgan" and that the Town Commission was aware that he was going there for the purpose of inquiring into Morgan's background. R5/47-48.

Upon arriving in Schwenksville, Whitt and Tice went to a diner seeking directions to the Independent, a newspaper located near Schwenksville, R5/61. Two patrons of the diner gave them directions. One testified that a police badge was displayed, R6/251, while the other stated "they said they were police officers from Florida" and displayed identification. He added that "a trailer being burnt" was mentioned in connection with Whitt's questions about Morgan, R6/262, 264.

Whitt and Tice then went to the office of the Independent, where Whitt instructed Tice to identify himself as a police officer, R5/108. Whitt identified himself as the Town Manager of Lake Park, and Tice displayed his Lake Park police identification. App. 11; R5/62, 107.

Lynn Nyce, an employee at the Independent, testified that Whitt told her that "properties Mr. Morgan owned, had mysteriously burned . . . I believe you here call it Jewish Lightning; in Florida they call it arson." She also testified that Whitt called Morgan "a crook," and that he stated, "We're going to get enough information on him to put his ass in jail." App. 11 n.1. J. Howard Fenstermacher, also present at the Independent, stated that "One guy, I think he said was a detective. And the other guy was some official from the town in Florida," R6/235, and that "they indicated they were conducting an investigation into [Morgan's] background." R6/236.

Returning to Schwenksville, Whitt and Tice met with Schwenksville Police Chief Francis Kuhn -- Tice again used

his police identification and Whitt gave Kuhn a business card which identified him as Town Manager, R5/64 -- and then with Police Chief Kuhn, the Mayor of Schwenksville, the Chairperson of the Schwenksville Town Council, the editor of the Schwenksville Item, and the Schwenksville Public Works Director, R5/66-67. Whitt again gave out his business card, this time to the Mayor and the Public Works Director, R5/286, R6/299.

Clarence Grimley, the Public Works Director, stated that Whitt said that he would like to lock Morgan's ass up, R6/283. Mayor Schlick recalled that Whitt identified himself as Town Manager, R6/296, and that Tice identified himself as a Police Sergeant. R6/296. Bruce McBain, the editor of the Item, stated that Whitt had "question[ed] the

character" of Morgan, R6/407, and that he was left "with the impression that Morgan was in deep trouble." App. 12; R6/401.

Morgan subsequently learned of Whitt's trip to Pennsylvania and of the investigation. He testified to the jury in the instant case that he was frightened and had lost sleep, and that he stopped regularly writing his newspaper column because "it's not worth it. You don't know what's liable to happen. Why jeopardize my family and myself for this? I'm too old for it." R5/132, 133, 134, 149. Morgan also stated that he feared for his safety and worried that he might be killed or his home bombed. Id.

PROCEEDINGS BELOW

Petitioner Frank Morgan filed this suit on April 18, 1985, against the Town

of Lake Park, Florida, and its Town Manager, Dennis Whitt. R1/1.

Morgan alleged that Whitt had defamed him and had invaded his privacy with the intent to chill the exercise of his First Amendment rights and that these actions violated his civil rights under 42 U.S.C. §1983. He also alleged that Whitt was a policymaker for Lake Park who had carried out his plans to violate Morgan's rights as part of a policy of the Town. R1/37.

The district court had jurisdiction over the federal civil rights claims pursuant to 28 U.S.C. §1343(3) and 28 U.S.C. §1331, and pendent jurisdiction over the Florida law claims. The jury returned a verdict for Morgan and against Whitt and the Town on all claims, specifically finding that Whitt defamed Morgan and invaded his privacy,

and that Whitt and the Town violated Morgan's civil rights. App. 63-64.

The jury awarded Morgan $37,500 compensatory damages against both defendants for violation of 42 U.S.C. §1983, $1,000 compensatory damages against Whitt for defamation and/or invasion of privacy, and $9,000 punitive damages against Whitt. App. 64-65.

Motions for new trial and for judgment n.o.v. were denied, and both Whitt and the Town appealed from the District Court judgment. The United States Court of Appeals for the Eleventh Circuit reversed, App. 3, 24. That court held that Morgan had failed to establish that Whitt's actions constituted the "policy" of the Town, App. 19, that Morgan had failed to establish that Whitt's actions were taken "under color of state law," and that Morgan had failed to establish

that Whitt's statements were made with "actual malice" regarding falsity, App. 21, 23-24.

Morgan's petition for rehearing and suggestion for rehearing en banc was denied on February 27, 1989. App. 1. Morgan then timely filed this Petition.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH APPLICABLE §1983 "UNDER COLOR OF" DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

The court below ruled that a public official who operates in concert with a police officer under his command can be released completely from jury-imposed personal liability under §1983.[2] This is an important federal question, with broad implications, which has been decided in conflict with the decisions of

2. The jury found Whitt personally liable for $38,500 in compensatory damages, and $9,000 in punitive damages. App. 64-65.

this Court and of numerous other courts of appeals. Further, the court below has treated the whole inquiry as a matter of law rather than a question of fact, as required by this Court. See Sup. Ct. Rule 17.1(a), (c).

In the instant case, a jury decided that a Town Manager and the Police Sergeant under his command repeatedly asserted and displayed the indicia of their public offices and drew upon the perquisites of those offices both to investigate a private citizen and to defame him. Yet, the Eleventh Circuit ruled that these public officials did not act "under color of" state law.

The stark inconsistency between the rule in the instant case and the "under color of" decisions of other courts of appeals is well-illustrated by Nishiyama v. Dickson County, 814 F.2d 277 (6th

Cir. 1987) (en banc). There, the Sixth Circuit, sitting en banc, held that a sheriff and deputy had acted "under color of" state law by allowing an inmate trustee to have unsupervised use of a patrol car for personal purposes. As a result, the court ruled, they could be held liable under §1983 when the inmate used the "apparent authority" of the patrol car to stop and kill a private citizen. Similarly, the Fifth, Sixth, Seventh, Ninth and Tenth Circuits repeatedly have ruled that public officials who exhibited <u>even</u> <u>one</u> of the indicia of office involved in the instant case, e.g., official identification, were acting "under color

of" state law.[3]

Indeed, the only case relied upon by the court below, Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981), is clearly distinguishable from the instant case both on its facts and its procedural posture. The police chief's assault on his sister-in-law in Delcambre did not entail the threat of arrest or any other official power. He struck her during a family argument -- clearly a far cry from Whitt's defamation of a political critic, accompanied by a threat

3. See, e.g., Howard Gault Co. v. Texas Rural Legal Aid, 848 F.2d 544 (5th Cir. 1988); Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1432-33 (10th Cir. 1984), cert. denied, 474 U.S. 818 (1985); Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), cert. denied, 456 U.S. 918 (1982); Harper v. Merckle, 638 F.2d 848 (5th Cir.), cert. denied, 454 U.S. 816 (1981); Layne v. Sampley, 627 F.2d 12 (6th Cir. 1980); Davis v. Murphy, 559 F.2d 1098, 1101 (7th Cir. 1977).

to "lock his ass up." Moreover, the Delcambre court simply affirmed the trial court's post-trial findings of fact, while the court in the instant case second-guessed and reversed a jury's fact-based verdict.

The "under color of" requirement involves a "necessarily fact-bound inquiry," Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982). See also Howard Gault Co., 848 F.2d at 552 (relationship between actor and state "is a factual matter which should not be set aside unless clearly erroneous"); Howerton v. Gabica, 708 F.2d 380, 383 (9th Cir. 1983). Therefore, the Eleventh Circuit's reversal of a reasonable jury verdict which was well-supported by evidence creates a dangerous precedent.

It is undisputed that Whitt's trip was financed in part by the Town. Also,

there was more than enough evidence for a fair-minded jury to believe that Whitt, like the district attorneys who served private clients in Howard Gault Co., had access to government officials and to their information as a result of his public office. Also, Whitt's public office enabled him to order Sergeant Tice to accompany Whitt and to identify himself as a police officer when questioning people.

Indeed, a parade of witnesses testified that Whitt identified himself as Town Manager and showed his business card, and that Sergeant Tice displayed his police identification. See pp 4-7, supra. Furthermore, Whitt himself told Tice "that's why I brought you along because people tell you more when they see i.d." R5/99, 103. He also told

Tice that the Town Commission had approved the trip.

The governmental officials and other witnesses in Pennsylvania gave greater weight to Whitt's accusations about the crime of arson solely because Whitt was "clothed with the authority of the state." The severe harm to Morgan's reputation came from the listeners' logical, reasonable belief -- reinforced by specific statements from Whitt -- that only a serious and official investigation of Morgan would necessitate a visit to Pennsylvania by the Town Manager of Lake Park, Florida, and one of his police sergeants. R5/237. The court below could ignore all of this evidence only by treating the "under color of" inquiry as a question of law, despite the established precedents of other circuits and this

Court holding that it is a question of fact.

In reversing the jury's verdict based upon interrogatories, the court below ruled: "There is nothing here in the record to indicate that Whitt was clothed with the power by the Town of Lake Park to make the alleged defamatory statements about Morgan." App. 21. As this statement demonstrates, the court below wrongly merged the §1983 "policy" inquiry -- did the Town give Whitt power to act as he did (largely a legal question) -- with the much broader "under color of" inquiry -- did Whitt possess and display indicia of governmental authority (a factual inquiry).

By improperly merging these separate inquiries, the court below directly contravened this Court's established §1983 methodology. As this Court has

noted: "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity." Griffin v. Maryland, 378 U.S. 130, 135 (1964) (emphasis added).

Nor does it matter whether or not Whitt exceeded or misused his authority. As long ago as United States v. Classic, 313 U.S. 299, 326 (1941), this Court insisted that "[m]isuse of power" can constitute action taken "under color of" state law. This principle was operationalized in Monroe v. Pape, 365 U.S. 167 (1961), which held police officers,

but not their employer city,[4] liable under §1983, even though they had no authority under state law to do what they did. The Monroe Court further noted that §1983 liability attaches to wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Id. at 172. See also National Coll. Athl. Ass'n v. Tarkanian, 109 S.Ct. 454, 461 (1989) (reaffirming this passage from Monroe); Lugar, 457 U.S. at 929; Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985)(en banc), cert. denied, 478 U.S. 1020 (1986).

4. Though Monell v. Department of Social Services, 436 U.S. 658 (1978), reversed the entity liability portion of Monroe, it reaffirmed the portion of Monroe addressing the individual liability of the officers. Id. at 663 n.7, 690-95.

This Court's decisions have established very detailed tests to restrict the liability of local governments for the acts of their officials, but have allowed a much broader scope for the individual liability of public officials for their own unconstitutional conduct. Compare City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988), and other narrowing "policy" cases discussed in part III below, with Monroe, Lugar, and other "under color of" cases discussed in this part. See also Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).

This Court has repeatedly held that even truly private citizens, who possess no actual governmental authority, can act under color of state law if they operate in concert with a police officer or other governmental official. "To act 'under color' of law does not require

that the accused be an officer of the State. It is enough that he be a willing participant in a joint activity with the State or its agents." Lugar, 457 U.S at 941-42, quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). Adickes itself had explained that the "involvement of a state official in such a conspiracy plainly provides the state action [requirement] . . . whether or not the actions of the police were officially authorized, or lawful." 398 U.S. at 152. See also Dennis v. Sparks, 449 U.S. 24 (1980) (private parties acted under color of law when they allegedly conspired with and bribed judge to issue illegal injunction); Tower v. Glover, 467 U.S. 914, 920 (1984).

Numerous other courts of appeals have followed this approach. See, e.g., Howard Gault Co. v. Texas Rural Legal

Aid, 848 F.2d 544, 552-55 (5th Cir. 1988) (private onion growers acted "under color" of state law via "interlocking relationships" with their private attorneys -- who were also district attorneys -- sheriff, and other officials); Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423, 1428-29 (10th Cir. 1984) (store, which hired off-duty police officer as private security guard, was under color of law because it acted in concert with police in the pursuit of its private business); Thomas S. v. Morrow, 781 F.2d 367, 377 (4th Cir.) (guardian a state actor because "'he has acted together with or has obtained significant aid from state officials....'"), cert. denied, 476 U.S. 1124 (1986).

Under these contrary decisions, even if Whitt had not (as he did) re-

peatedly identified himself as the Town Manager, Sergeant Tice's participation, pursuant to Whitt's command, provided the necessary "color of" law. The assistance and support of one of the Town's police officers must have lent a greater air of gravity and credibility to Whitt's defamatory remarks and intrusive questions. See, e.g., Booker v. Atlanta, 776 F.2d 272, 274 (11th Cir. 1985) (police officer's arrival with private repossessor gave "cachet of legality" to repossessor's actions); Lusby, 749 F.2d at 1429 (flashing of police badge, verbal identification as officer); Howerton v. Gabica, 708 F.2d 380, 382, 384 (9th Cir. 1983) (police assistance with private eviction).

If the opinion below is allowed to stand, a public official who draws upon governmental resources to injure a

private citizen will be immune from a §1983 suit in the Eleventh Circuit, while in other circuits a private citizen who does the same thing will be liable. This Court should correct this anomaly by granting certiorari to reinstate the reasonable jury verdict and district court judgment.

II. THE DECISION BELOW CONFLICTS WITH THE FIRST AND SEVENTH AMENDMENTS BY REQUIRING A CITIZEN-CRITIC TO PROVE THAT A DEFENDANT PUBLIC OFFICIAL LIED ABOUT EXTRANEOUS MATTERS WITH MALICE, AND BY REJECTING A VERDICT THAT FOUND MALICE.

By granting certiorari in this case, this Court would have the opportunity to resolve one or more of the three current conflicts among the courts of appeals which the decision below either joined or created. See Sup. Ct. R. 17.1(a). In addition, this case allows this Court to clarify First Amendment law by ruling that the constitutional

privilege given critics of the government is not available to benefit government officials who have been criticized. Thus, when a government official vilifies a citizen-critic regarding past personal matters, the citizen should not have to show actual malice.

A. The Court Below Joined a Circuit Conflict, Reflected in a Case Pending in This Court, by Second-Guessing the Jury Finding That Defendant Acted With Actual Malice.

Petitioner asks that decision on this portion of the instant Petition be deferred until this Court has issued an opinion in the case of Connaughton v. Harte Hanks Communications, Inc., 109 S.Ct. 257 (1988) (No. 88-10) (granting certiorari). At the least, the need for a grant of certiorari or remand in light of Connaughton will then be clear.

The courts of appeals are split on the issue of the proper standard that

should apply when reviewing a jury's finding of "actual malice" in constitutionalized defamation cases. See Connaughton, 842 F.2d 825, 840 n.8, 842 nn. 10-11 (6th Cir. 1988) (discussing the split). At issue is the proper application of "de novo" review of actual malice in First Amendment cases. Some courts, reading New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), to their most extreme, conduct a virtual retrial, based on the paper record, of the actual malice issue previously presented to the jury. That is, they disregard the credibility calls and rational inferences made below and fail to accord juries the deference they deserve under the Seventh Amendment. See, e.g., Tavoulareas v. Piro, 817 F.2d 762, 804-05 (D.C. Cir. 1987) (en banc)

(Wald, J., concurring) (characterizing majority analysis), cert. denied, 108 S. Ct. 200 (1988); McCoy v. Hearst Corp., 42 Cal.3d 835, 727 P.2d 711, 718, 231 Cal. Rptr. 518, 524 (1986). This standard apparently was adopted and applied by the Eleventh Circuit in the instant case.

By contrast, other courts give due deference to underlying factfindings, jury calls on credibility, and the superior position of the trial factfinder to determine demeanor and nuances of subjective intent. See, e.g., Connaughton, 842 F.2d at 840-44; McKinley v. Baden, 777 F.2d 1017, 1022 (5th Cir. 1985) ("We do not disturb [the court's] credibility choice."); Guam Fed'n of Teachers v. Ysrael, 492 F.2d 438, 441 (9th Cir.), cert. denied, 419 U.S. 872 (1974). See also Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge....").

The decision below cannot stand if this Court affirms Connaughton or otherwise clarifies that a jury cannot be ignored after doing its job properly.[5] The court below conceded that "[i]n a general way it may be argued that [Whitt] had a purpose and intent to find whatever unsavory things he could about

5. The analysis this Court applies in Connaughton may well control here. Thus, at the least, the Eleventh Circuit should be required to review the verdict based upon this Court's refinement of its review standard.

Respondent in Connaughton has also urged this Court to find that Bose does not apply at all in the jury context. See Br. of Respondent in Connaughton, (No. 88-10) at 7-8, 47-48. Such a ruling is not necessary to afford relief to Petitioner in the instant case but would, if adopted, require reversal and remand here.

Morgan," App. 23, but still concluded that no actual malice was shown. The court did not discuss the ample record evidence from which a jury reasonably could (and did) find that Whitt knowingly lied or acted in subjective reckless disregard of the truth. For example, Whitt repeatedly accused Morgan of arson, see R6/210-11, 262, 264, without any basis for such an accusation. He also repeatedly said that he would lock Morgan up, see R6/210-11, 236, 283, again without any basis for believing that Morgan had committed any crime.

Intrusive appellate review is particularly inappropriate in this case. Petitioner Morgan is a concerned citizen who openly and honestly criticized Whitt, a public official. Whitt responded by repeatedly pillorying Morgan

with known lies and spreading false rumors, which were exacerbated by the power and influence of Whitt's public office. Whitt used his access both to the media and to government officials in Schwenksville, as well as his supervision of Sergeant Tice, to harm Morgan. A properly instructed jury -- in ruling that Whitt was liable for defamation, invasion of privacy (false light) and for a §1983 violation, App. 63-65 -- must have found that Whitt's statements were false, that he acted with actual malice, and that these lies substantially damaged Morgan's reputation. Ironically, the Eleventh Circuit then apparently applied Bose for its broadest "de novo" review, disregarding substantial contrary evidence in the record and the credibility calls the jury apparently made.

Bose, as misinterpreted by the decision below, can now be used to punish a critic of government and to protect the retaliating public official by allowing an appellate court to ignore jury findings against that official. That approach is inconsistent with Bose's stated goal of "mak[ing] sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose, 466 U.S. at 499, quoting New York Times, 376 U.S. at 285. The citizen-critic suing a public official should not be asked to win his case twice -- under a heightened standard of proof -- just because this Court has established broader appellate

review to protect free speech.[6]

The Eleventh Circuit's decision in this regard also joins a separate but related conflict among the circuits regarding whether Bose's "de novo" review standard should apply at all when the trial findings were in favor of free speech. See Don's Porta Signs, Inc. v. City of Clearwater, 108 S.Ct. 1280, 1280-81 (1988) (White, J., dissenting from denial of certiorari) (discussing the split). The Eleventh Circuit has adopted the position that de novo review applies on appeal even if the finding

6. To the extent the court below also can be read to have found that no falsity was established, the Eleventh Circuit has created a circuit conflict with the Fifth Circuit. In this case, the court independently decided the issue of falsity by ignoring substantial contrary evidence; by contrast, the Fifth Circuit has rejected Bose's "de novo" review over the issue of falsity. Levine v. CMP Publications, Inc., 738 F.2d 660, 668-71 (5th Cir. 1984), reh'g en banc denied, 753 F.2d 1341 (1985).

below was ultimately pro-speech or struck down governmental restrictions on speech. See Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 108 S.Ct. 1280, 1280-81 (1988).

That position, which Petitioner regards as incorrect, also has been adopted in the Fifth, Tenth, and D.C. Circuits.[7] Under that approach, utterly reasonable factfinding supporting free speech can be reversed, even though Bose's stated rationale was to allow appellate courts to protect the free

7. See Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 897-98 (5th Cir. 1985), cert. denied, 475 U.S. 1119 (1986); National Ass'n of Gov't Employees v. National Fed'n of Federal Employees, 844 F.2d 216, 220 (5th Cir. 1988); Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323, 1326 (10th Cir. 1984); Tavoulareas v. Piro, 759 F.2d 90, 107 (D.C. Cir.), vacated on other grounds en banc, 763 F.2d 1472 (1985), aff'd, 817 F.2d 762, cert. denied, 108 S.Ct. 200 (1987).

speech interest at stake. The instant case reflects that inappropriate approach, by rejecting the jury's vindication of Morgan's free speech right.

By contrast, de novo review has been rejected by the Seventh and Ninth Circuits, as well as by Connecticut.[8] Petitioner contends that this is the correct approach.

This Court should grant certiorari as the instant case presents the proper vehicle to resolve this pressing and recurrent split. Here, the jury finding of actual malice has vindicated the citizen-critic Morgan. To allow the decision below to stand would be akin to

8. See Planned Parenthood Ass'n v. Chicago Transit Authority, 767 F.2d 1225, 1228-29 (7th Cir. 1985); Daily Herald Co. v. Munro, 838 F.2d 380, 384 (9th Cir. 1988); Brown v. K.N.D. Corp., 205 Conn. 8, 529 A.2d 1292, 1295 (1987). See also Note, 40 U. Miami L. Rev. 307 (1985).

permitting a court of appeals to freely review and reverse, under a false free speech label, the jury's vindication of John Peter Zenger in 1735.

B. The Eleventh Circuit's Opinion Turns the First Amendment Protection of New York Times v. Sullivan on its Head, by Applying its Citizen-Critics' Privilege in a Manner Which Shields the Public Official Being Criticized, Rather Than the Citizen.

In addition to the intrusive standard of review it applied, the court below made the fundamental error of switching the parties meant to be protected by the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). That case held a state's tort law unconstitutional under the First and Fourteenth Amendments because it conflicted with the citizen's right to challenge government officials. The decision was premised on the citizen's

role in a democracy and the ideal of robust public debate. Id. at 270; see Kalven, The New York Times Case: A Note on 'the Central Meaning of the First Amendment,' 1964 Sup. Ct. Rev. 191.

Here, by contrast, state libel law worked at trial. The jury vindicated the plaintiff citizen, who had criticized the defendant government official, by awarding moderate damages in tort. The jury necessarily found falsity and constitutional malice. App. 35-36, 52-53 (charge); id. 63-65 (verdict). On appeal, though, the public official used New York Times as a shield against this proper exercise of state tort law.

Such a mechanical application of that protection turns New York Times on its head. Surely Commissioner Sullivan could not have claimed a First Amendment privilege if, rather than availing him-

self of the courts, he had retaliated by spreading false defamatory rumors about the ministers who criticized him.

This Court should hold that the First Amendment privilege now protecting defendants (and the requirement that plaintiffs show actual malice) simply does not apply where the defendant is a public official and the plaintiff is a critical citizen. An application of state tort law which protects speech is entirely constitutional, and should be left alone.

Furthermore, in this case the Eleventh Circuit has created a rule that the public critic becomes a "general purpose public figure," thereby losing any constitutional or state law protection, simply by exercising his First Amendment right to enter a debate on public issues. See App. 22. Here,

Whitt used his public office to vilify Morgan, but when Morgan sued to redress Whitt's personal vendetta, Morgan suffered further by the court's mechanical application of New York Times to terminate both his tort claim and his civil rights claim.

The Eleventh Circuit ruled that the official, Whitt, is not liable unless citizen Morgan showed actual malice and falsity by clear and convincing evidence. Such a result will have a lasting and recurrent negative impact upon the unassailable goal of permitting breathing space to criticize the state. Compare McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985) (architect suing over comments Senator made in weekly broadcast found to be public figure).

Petitioner urges this Court to consider, at the least, the question of

the scope of attack for which a public figure exposes himself, and to find in this case that the extreme defamatory remarks Whitt made were outside the boundaries of Morgan's "limited public figure" status. See Time, Inc. v. Firestone, 424 U.S. 448 (1976).

If Morgan can be considered a public figure at all, he is at most a citizen "who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (emphasis added). The court below made no attempt to determine whether "the alleged defamation [was] germane to the plaintiffs' participation in the controversy." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980). Instead,

the court below treated Morgan as a general purpose public figure, based solely upon a citation Gertz, see App. 22. The court thereby opened Morgan to Whitt's lies on the broadest possible range of personal issues having nothing to do with Morgan's public criticism of Whitt.

If the court below had applied these contrary precedents to the undisputed facts of the instant case, there could have been but one conclusion: the "public controversy" concerned only a limited issue -- the governance of the Town of Lake Park. Whitt's baseless accusations that Morgan had committed "arson" in another state many years earlier could not possibly have been considered "germane to plaintiff's participation in the controversy." Had Commissioner Sullivan in New York Times retaliated by repeatedly and without any ba-

sis accusing the ministers of arson, surely he could not then have claimed a First Amendment defense by contending that the ministers became "public figures" as to all subjects solely by criticizing him in the press.

The court in Dowd v. Calabrese, 589 F. Supp. 1206 (D.D.C. 1984), specifically rejected such a defense in a parallel situation. There, a prosecutor sued a reporter for libel. The reporter counterclaimed, alleging that the prosecutor had violated the First Amendment by launching a investigation against him in retaliation for the reporter's critical articles. Though the prosecutor claimed he had "enormous provocation" to initiate the investigation, the court stressed the fundamental difference between the prosecutor and the reporter, viz. the prosecutor may

> be sued for deprivation of the constitutional rights even if some or all of his actions were, but for his governmental affiliation, comparable to [the reporter's]. It also follows that, if [the prosecutor] was provoked by [the reporter's] actions, his appropriate remedy was the one he ultimately chose -- a libel action; he could not lawfully use the power of his office to retaliate.

Id. at 1223 (footnote omitted) (emphasis added). Whitt has likewise used "the power of his office to retaliate." He should not be privileged to do so. Compare Pickering v. Board of Educ., 391 U.S. 563 (1968) (citizen writing letters to newspaper protected); City of Houston v. Hill, 482 U.S. 451 (1987) (citizen disagreeing with police officer not to be arrested for violating interruption ordinance). The decision below leaves the citizen-critic without even the protection of normal state libel law that existed in 1789.

III. THE DECISION BELOW DIRECTLY CONTRAVENES THIS COURT'S §1983 "POLICY" JURISPRUDENCE AND INSULATES MUNICIPALITIES FROM §1983 LIABILITY FOR THE UNCONSTITUTIONAL ACTIVITIES OF THEIR HIGH-LEVEL OFFICIALS.

The decision below wrongly insulates local governments from liability for §1983 violations, even when political retaliation against a private citizen is undertaken by their highest executive officers. Unlike recent cases decided by this Court, the instant case is not one which presents the question whether a municipality can be held liable under §1983 for an isolated tort committed by a low-level employee, such as a rookie police officer. Rather, this case involves a Town's liability for the actions of its highest executive officer -- the Town Manager. Nor is this a case where that high-level policymaking official, in a fit of passion, commits a single egregious act. Rather,

this case involves a chief executive officer, over a period of years,[9] marshalling all of the considerable governmental resources at his command to quell political criticism in the press. Moreover, the testimony before the jury demonstrated that the highest elected officials of the Town of Lake Park acquiesced in this policy, and that the Town ratified Whitt's actions by expending public funds toward the execution of the policy.

This Court has explained that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level." Pembaur v. Cincinnati,

9. The testimony before the jury indicated that in 1983 Whitt had "suggested" to the Town's Chief of Police to "conduct an investigation into Frank Morgan's background, dig up dirt, let him know I have this information, but not use it." R5/82 (testimony of Police Chief Riccardi).

475 U.S. 469, 480 (1986) (majority); see also id. at 483 (plurality). The decision below thus contravenes this Court's precedents clarifying the "policy" element of §1983, and frustrates the Congressional goals underlying §1983. See Sup. Ct. Rule 17.1(c).

Here, Town Manager Whitt marshalled all the trappings of his office -- including essentially plenary powers over police matters, finances, personnel decisions, and investigations -- to harass a Town citizen who had criticized government in the press. Contrary to the jury's specific finding, see App. 63-64, the court below found that Whitt's actions -- use of a police sergeant and public funds in an investigation involving allegations of criminal behavior -- did not represent the Town's official policy. App. 19.

The trial court instructed the jury:

> The Court instructs you, as a matter of law, that the Defendant Whitt possessed final authority to establish municipal policy with respect to his actions, which are the subject of this lawsuit, and that the Town of Lake Park is liable for his actions, if you find those actions to have been unlawful.

(R7/602; App. 47). This charge was based on Florida law, including the Charter of the Town of Lake Park. App. 40. But the Eleventh Circuit, after erroneously quoting Plaintiff's Proposed Instruction, see App. 66-67, ruled that instruction, which was not given, to be incorrect. App. 18-19. The actual instruction given at trial, quoted above, accords with this Court's latest pronouncement on the "policy" element:

> "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an offi-

> cial who possesses such authority, and, of course, whether an official ha[s] final policymaking authority is a question of state law."

City of St. Louis v. Praprotnik, 108 S.Ct. 915, 924 (1988) (plurality of O'Connor, White, and Scalia, JJ., and Rehnquist, C.J.) (emphasis added), quoting Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) (plurality of Brennan, White, Marshall, and Blackmun, JJ.).

The court below made no mention of the controlling Praprotnik case, which was cited in briefs and analyzed in oral argument. It is undisputed that, under Florida law and the Town Charter, Whitt's position as Town Manager made him the chief administrative and law enforcement officer of the Town. R5/30. He was in charge of all Town personnel, including the police force; this enabled Whitt to order Sergeant Tice to accom-

pany him and to show his police identification. Whitt had authority to expend Town funds for telephone calls to public officials in Pennsylvania prior to his trip and to spend Town funds for airfare to carry out the investigation of Morgan. Whitt had authority to identify himself as Town Manager. Whitt repeatedly employed and invoked these official Town powers during his investigation of Morgan.

The court below opined that "it is beyond this Court's imagination to discern" what policy "the Town could have with respect to the investigation of a private individual not in any way connected with the Town." App. 18. The court apparently meant that it could imagine no constitutionally acceptable policy of the Town to investigate its private citizens. That, however, is not

-- and cannot be -- the appropriate standard. In fact, it is easy to imagine a Town, through its Manager and the Police Department he controlled, undertaking an investigation of any citizen who actively opposed high-level officials.[10] Indeed, there was evidence before the jury that the trip to New York may have been a pretext for justifying the trip to Pennsylvania. See note 1, supra. This Court's "policy" jurisprudence has developed primarily to battle the unconstitutional policies sometimes undertaken by officials of local government. See Pembaur (county prosecutor and sheriff); Monell v. Dept. of Social Services, 436 U.S.

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[10]. In 1983, Morgan had accused city officials of acting "stupidly" with regard to its firefighters, R5/147. He also had criticized a Town Commissioner for violating the Town Charter, R5/143-44, and supported the Mayor's opponent in one campaign. R5/137-38, R6/350-62.

658 (1978) (Mayor, City Council, Chancellor, and others); Owen v. City of Independence, 445 U.S. 622 (1980) (Mayor, City Council, and City Manager).

Even an otherwise constitutionally sound policy can lead to municipal liability, if the policy "reflects deliberate indifference to the constitutional rights of its inhabitants." City of Canton v. Harris, 109 S.Ct. 1197, 1206 (1989) (inadequate police training). The instant case, however, does not involve this difficult issue. Rather, this case involves a high-level official plotting and executing a long-term campaign to silence political opposition.

The court below wrongly decided to insulate Whitt's unconstitutional behavior simply because the motive underlying the intimidation appeared to be personal

or political vindictiveness. App. 23. That is a distinction without a difference. If the city manager of a municipality ordered the police department under his command to arrest all black persons in the town, the fact that the mayor acted solely as a result of personal bigotry could not insulate the unconstitutional policy from a §1983 attack. Yet, that is precisely the result that the decision below, if allowed to stand, would require. That result would be antithetical to the intent of the 1871 Congress, which enacted the precursor of §1983, and to the "policy" decisions of this Court. See, e.g., Monell, 436 U.S. at 664-89.

Whitt's conduct also became Town "policy" by reason of the Town Commission's subsequent ratification, see Praprotnik, 108 S.Ct. at 926-27, as man-

ifested in its financial support of Whitt's venture and by the Town Commission's subsequent acceptance of his conduct without dissent when it became known. This was not a case of an anonymous public employee who, while his employer was blithely unaware, misappropriated the public resources at his disposal to silence an adversary. Instead, the Town's chief executive took action within his authority against a citizen who had criticized both him and the Town Commissioners.

The erroneous ruling of the court below reversing the jury's verdict effectively insulates municipalities from the unconstitutional acts of high-level officials. That decision puts the Eleventh Circuit far outside the accepted limits of this Court's §1983 "policy" jurisprudence.

This case did not present to the court below the difficult inquiry of "whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton v. Harris, 109 S.Ct 1197, 1203 (1989). Here, the policy was designed to directly harm Morgan. The policy was developed and executed by the Town's highest administrative officer. After the policy had been carried out, and Morgan harmed, the Town Commission took no action against Whitt. Instead, the Town paid for some of the expenses necessary to carry out the unconstitutional policy. Faced with these facts, a properly charged jury found for plaintiff and awarded modest damages.

To allow this dangerous precedent to stand will result in the immunization

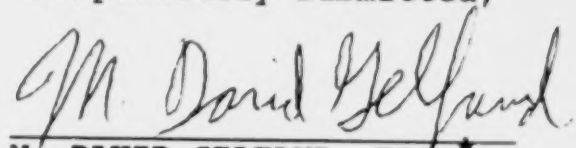
of municipalities from liability under §1983 for the unconstitutional acts of their highest officials.

CONCLUSION

Petitioner Frank Morgan urges this Court to reverse the erroneous decision of the Eleventh Circuit, and reinstate the jury verdict and district court judgment. This Court should grant the writ of certiorari to resolve the various splits among the courts of appeals, and to address the important federal questions presented by the Petition. Petitioner asks this Court to defer decision on Part II of the

Petition until after rendering your decision in Connaughton.

Respectfully submitted,

By 

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NO.

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CLERK

In the
Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, AND THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5556 & 87-6112

FRANK MORGAN,

Plaintiff-Appellee,

versus

DENNIS WHITT, Individually and in his official capacity and THE TOWN OF LAKE PARK,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion January 11, 1989, 11 Cir., 1989, ____ F.2d ____).
(February 27, 1989)

Before HATCHETT and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are Denied.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active not having voted in favor of it, Rehearing In Banc are also DENIED.

ENTERED FOR THE COURT:

/S/ Joseph W. Hatchett

United States Circuit Judge

Frank MORGAN, Plaintiff-Appellee,

v.

James TICE, Defendant,

Dennis Whitt, individually and in his official capacity and The Town of Lake Park, Defendants-Appellants.

Frank MORGAN, Plaintiff-Appellee,

v.

Dennis WHITT, individually and in his official capacity and The Town of Lake Park, Defendants-Appellants.

Nos. 87-5556, 87-6112

United States Court of Appeals,
Eleventh Circuit.

Jan. 11, 1989.

Before HATCHETT and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal from a judgment based on a jury verdict for compensatory damages against The Town of Lake Park and Dennis Whitt, the Town manager, and for punitive damages against Whitt, together with attorneys' fees against both defendants.

STATEMENT OF THE CASE

The plaintiff, Frank Morgan, filed a complaint against Dennis Whitt ("Whitt") and the Town of Lake Park seeking damages for alleged deprivation of constitutional rights in violation of the First, Fifth and Fourteenth Amendments, under color of state law, and wherein he also sought damages in a

pendent state claim for alleged defamation by defendant Whitt. Following the trial, the jury concluded that the plaintiff was entitled to compensatory damages of $37,500 against both defendants under 42 U.S.C. §§1983 and compensatory damages of $1,000 against Whitt under the pendent defamation claim. The jury also found in favor of punitive damages against Whitt alone for $9,000. The Town and Whitt duly filed their notice of appeal from this judgment. This is the appeal No. 87-5556.

Subsequently, Morgan filed a motion for the allowance of attorneys' fees and costs and the trial court granted plaintiff fees and costs against defendants in the amount of $44,670.88. The defendants duly appealed from this judgment and this appeal is No. 87-6112.

This Court subsequently consolidated the two appeals for consideration by this Court.

A. APPEAL IN NO. 87-5556

(1) Statement of Facts

The jury had sufficient evidence before it to have believed that the following occurred:

Whitt was Town manager of Lake Park from February 17, 1982 to sometime late in 1986. He first met Morgan in March, 1982, while Morgan was campaigning for a mayoral candidate who was subsequently elected. During Whitt's incumbency as Town manager, he performed certain Town matters in a way that was strenuously opposed by Morgan. As a result, Morgan criticized Whitt repeatedly, both verbally and as a writer of a weekly column in a local weekly newspaper,

Weekday. He accused Whitt of violating the city code and likened some of the actions taken by Whitt as being reminiscent of the time when Hitler came to power with the Nazi government in Germany.

During the years in question, Morgan was active in publicly supporting several candidates for Town offices. He was a former resident of Pennsylvania who moved to Florida in 1978. In Pennsylvania he had held political office for a number of years as a township supervisor and mayor of Schwenksville. At the time here relevant, it was clear from undisputed evidence that he had become a public figure within the meaning established by the Supreme Court, in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and Gertz v.

Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

As stated by the appellee:

> In Lake Park, the Town Manager is empowered "[t]o see that the laws and ordinances are enforced." Town of Lake Park Charter art. VI, § 3(a) . . . Indeed, the Charter makes him the "administrative head of the municipal government under the laws of the Town." Town of Lake Park Charter art. VI, § 1. More specifically, the Town Manager has the power to appoint and remove, subject to confirmation by the Town Commission, "all subordinate officers" of the Town, except the Town Attorney and Town Auditor. Town of Lake Park Charter art. VI, § 3(e).

On January 31, 1985, Whitt, accompanied by a Sgt. Tice, of the Town's police department, started for Auburn, New York to investigate the truth of a claim made by an employee of the Town police department that she had graduated from high school. Their investigation discovered that this statement in the employee's application

was false. At about the time the trip was to be executed, Whitt discovered that they would have to change planes in Philadelphia in order to fly to Syracuse on the way to Auburn. Thereupon, he and Tice took a stopover in Philadelphia, on their own time.

Whitt charged the couple of days of stopover against his annual leave and Tice took his stopover time as comp time. They rented an automobile in Philadelphia and drove to Schwenksville where they then sought to get information which Whitt hoped to use to counter the actions of Morgan which were intended to vilify Whitt. The airplane fare to Syracuse was increased by some $400 by reason of the stopover in Philadelphia. While Whitt charged the roundtrip fares to the Town, he testified that he did not know of the

fact that the stopover added to that cost. Whitt and Tice paid their own expenses while on the sidetrip to Schwenksville, including an overnight stay in Philadelphia.

Upon arriving in Schwenksville, Whitt and Tice went to the office of a local newspaper, The Independent, and spoke to the person in charge, Lynn Nyce. She stated then that there was no one there who was authorized to let them see the back numbers of the newspaper. During their discussion, Whitt made a statement to the effect that Morgan had become involved previously in the Schwenksville area in some sort of land development scheme and that the properties he owned had mysteriously

burned.[1]

Whitt presented his business card as city manager of the Town of Lake Park and Tice showed his police I.D. both to the newspaper people and later to the officials of Schwenksville on whom they

---

1. The testimony of Ms. Nyce at this point was as follows:

A. He went on to say -- he called Mr. Morgan a crook. He said that he planned to remove him from public service, and he was going to do that by getting enough information on him to put him in jail.

Q. Did he use the words, put him in jail, or say something more specific, if you can remember?

A. He said, we're going to get enough information on him to put his ass in jail.

Q. Did he say anything else to you?

A. A number of things. That they had been visiting public places in the area. One that was mentioned was the Limerick Diner, which is about ten minutes away.

He said that they had been questioning people, and that people that knew of Mr. Morgan, didn't have anything nice to say about him.

called next. At the town hall, they had access to town minutes and had conversations with the mayor, the chief of police, other town officials and a newspaper man. The latter testified on deposition that after the meeting at the city hall, he had the impression that Morgan was in deep trouble. He stated, however, that this was of no surprise to him because of his "knowledge of Mr. Morgan." He stated: "As I say, I knew Mr. Morgan. For someone to come and say Mr. Morgan was in trouble in another state or town, would be no surprise to me."

After the sidetrip to Schwenksville, Whitt and Tice continued to Syracuse and then Auburn, New York, where they investigated the educational status of a Town employee because some doubt had arisen whether she had

truthfully stated that before her employment, she had graduated from high school in Albany. This was dealt with by both Whitt and Tice as a criminal investigation for the Town of Lake Park.

Morgan testified that after he had learned about the trip to Schwenksville, he had become fearful for his safety, saying that he was afraid his home might be bombed or that he might actually be killed, that it left him uneasy and unable to sleep normally. He thereafter, however, continued to write his weekly column and he later supported other persons, including his daughter, for election to the Town council.

(2) Issues on Appeal

I. Did the trial court err in not granting the motion of the Town of Lake Park for a judgment n.o.v.

because, either

(a) Whitt was not the final policymaker of the Town as to actions which were the subject of this action, or

(b) Because Whitt's actions were not shown to have been taken under the color of state law?

II. Did the trial court err in not granting the defendant' Whitt's motion for judgment n.o.v. at the conclusion of the case because either

(a) There was a failure by the plaintiff to show that the alleged damage was caused by action taken under color of state law, or

(b) Because there was a failure to establish by clear and convincing evidence that Whitt

had acted with actual malice?

(3) Discussion

(a) Liability Under Section 1983

(1) Liability of the Town of Lake Park Under Section 1983

The jury found both Whitt and the Town liable to Morgan on the counts of the complaint that were based on 42 U.S.C. §1983. That Section provides as follows:

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. §§ 1983.

The Supreme Court, in Monell v.

Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), held for the first time that a municipality could be held liable as a person under certain circumstances under Section 1983. The Court there said:

> We conclude, therefore, that a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents [on the theory of respondeat superior]. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

436 U.S. at 694, 98 S.Ct. at 2037-2038.

The first question raised by this appeal, therefore, is whether Whitt's actions amounted to an "execution of a government's policy or custom," as made by one "whose edicts or acts may fairly be said to represent official policy."

Our consideration of this question

is aided by the Supreme Court's later decision in Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Referring to the Monell case, the Court in Pembaur said:

> The conclusion that tortious conduct, to be the basis for municipal liability under §1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" -- that is, acts which the municipality has officially sanctioned or ordered.

106 S.Ct. at 1298 (footnote omitted.)

While appellee strongly argues that Whitt was the final authority of the Town of Lake park in determining official policy of the Town, he

completely fails to establish what "policy" the Town could have with respect to the investigation of a private individual not in any way connected with the Town. Not only did the plaintiff fail to prove any such policy, but it is beyond this Court's imagination to discern any such policy of any municipality.

The trial court therefore erred in charging the jury over defendant's objection that:

> The court instructs you as a matter of Florida law, that the defendant Whitt possessed final authority to establish municipal policy with respect to his actions which are the subject of this lawsuit, and that the town of Lake Park is liable for his action, if you find the actions to have been wrongful.

(Emphasis added.)

As we have stated above, this charge was incorrect not only because there was substantial dispute as to

whether Whitt was purportedly acting in an official capacity but more especially because no municipal policy was established with respect to the sort of action that Whitt was admittedly engaged in.

We conclude, therefore, that the trial court in erred in not granting judgment n.o.v. for the Town because of the failure of the plaintiff to establish the municipality's liability under the standards of Pembaur and Monell.

(2) Liability of Whitt Under Section 1983

As conceded by the appellant, a public official may act under color of state law -- as required to satisfy the predicate for liability under 42 U.S.C. §§ 1983 -- even if he is not acting pursuant to a state law if, in

performing a wrongful act which deprives another of his constitutional rights, the official is able to do so by virtue of the position he holds. Brown v. Miller, 631 F.2d 408 (5th Cir. 1980).[2] However, as indicated by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the principle involved in such a situation which is characterized as the "misuse of public power" situation is that the official who acts without legal authority is able to do so only because he is "clothed with the authority of state law." 365 U.S. at 184, 81 S.Ct. at 482, citing United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368.

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2. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

There is nothing here in the record to indicate that Whitt was clothed with the power by the Town of Lake Park to make the alleged defamatory statements about Morgan. His authority, as Town manager, if any, had no effect on what he had to say while visiting Schwenksville or upon his return to Lake Park, and that is what he is here being sued for. See Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (per curiam) (sheriff not acting under color of law when he assaulted sister-in-law).

We also conclude, therefore, that defendants were entitled to a judgment n.o.v. on the §§ 1983 counts because of a failure to establish that any conduct of Whitt that was deleterious to the plaintiff was done under color of state law.

(3) Whitt's Liability on Pendent State Claim

Whitt's principal contention in appealing from the verdict and judgment on the pendent state defamation claim is that the proof below was totally without a showing of actual malice by him in his statements. As pointed out before, it is clear that Morgan was a public figure since he "thrust himself into the vortex of [a] public issue." Gertz v. Robert Welch, Inc., 418 U.S. 323, 353, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789 (1974). The First Amendment, therefore, requires that Morgan prove by clear and convincing evidence that the statements were false and made with actual malice. Id. at 352, 94 S.Ct. at 3008. In New York Times v. Sullivan, supra, the Court defined "actual malice" as a statement made "with knowledge it was false or with reckless disregard of whether it

was false or not." 376 U.S. at 280, 84 S.Ct. at 726.

Whatever statements were made by Whitt during his visit to Schwenksville, Pennsylvania or were published by him upon his return to the Town of Lake Park, so far as anything in the record discloses, represented his honest belief. The plaintiff made no effort to show that the comments made by Whitt were false. In a general way it may be argued that he had a purpose and intent to find whatever unsavory things he could about Morgan. This does not, it seems to us, constitute the actual malice in the making of false defamatory statements that was defined by the Court in Sullivan.

We conclude, therefore, that the trial court erred in not granting Whitt's motion for judgment n.o.v. on

the pendent state defamation claim.

The judgments are therefore REVERSED.

B. APPEAL IN NO. 87-6112

This is an appeal by the appellants from the grant of attorney's fees against both appellants by the trial court. The appeal is taken to protect the interests of appellants if this Court reverses the trial court's judgments in their favor.

Since we have reversed the judgments against Whitt and the Town, Morgan cannot claim to be the "prevailing party" under 42 U.S.C. §1988.

The judgment for attorney's fees and costs is REVERSED.

THE COURT: Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdicts.

It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact, and to apply the law to the facts as you find them from the evidence.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case--that is, in reaching your decision as to the facts--it is your sworn duty to follow the law as the Court is now in the process of defining for you.

Unless otherwise stated, you should consider each instruction to apply separately and individually to each Defendant on trial.

Further, you must follow all of the

Court's instructions as a whole. You have no right to disregard or give special attention to any one particular instruction, or to question the wisdom or correctness of any rule of law the Court may state to you.

That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as given to you, regardless of the consequences.

That is the promise you made and the oath you took before being accepted by these parties as jurors in this case, and they have the right to expect nothing less.

By the same token, it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy.

In your deliberations, you are to

consider four distinct claims:

First, the claim of Frank Morgan against Dennis Whitt for slander.

Second, the claim of Frank Morgan against Dennis Whitt for invasion of privacy.

Third, the claim of Frank Morgan against Dennis Whitt for deprivation of constitutional rights brought under 42 United States Code, Section 1983.

Fourth, the claim of Frank Morgan against the Town of Lake Park for deprivation of constitutional rights brought under 42 United States Code, Section 1983.

Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party.

Therefore, in your deliberations,

you should consider the evidence as it relates to each claim separately, as though each claim was tried before you separately.

Although there are two Defendants in this action, it does not follow from that fact alone that if one is liable, both are liable.

Each defendant is entitled to a fair consideration of his own defenses, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. Unless otherwise stated, all instructions given you, govern the case as to each defendant.

Members of the jury, in determining the believability of any witness and the weight to be given to his or her testimony, you may properly consider the demeanor of the witness while

testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; the interest of the witness, if any, in the outcome of the case; the means and opportunity the witness had to know the facts about which he testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness; considered in light of all the evidence in the case, and in the light of your own experience and common sense.

The party with the burden of proof on any given issue, has the burden of proving every disputed element of his claim to you by a preponderance of the evidence.

If you conclude that the party bearing the burden of proof has failed

to establish his claim by a preponderance of the evidence, you must decide against him on the issue you are considering.

What does a preponderance of the evidence mean? To establish a fact by a preponderance of the evidence, means to prove that the fact is more likely true than not true.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents.

In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced

them.

If you find that the credible evidence on a given issue is evenly divided between the parties--that it is equally probably that one side is right, as it is that the other side is right--then you must decide that issue against the party having this burden of proof.

That is, because the party bearing this burden must prove more than simple equality, he must prove the element at issue by a preponderance of the evidence.

On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof--that what the party claims is more likely true than

not true--then that element will have been proved by a preponderance of evidence.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply in a civil case such as this, and you should put that standard out of your mind.

The first claim of Plaintiff in the case for your determination is on the defamation claim of the Plaintiff against the Defendant, Dennis Whitt. There is no defamation claim against the Defendant, Town of Lake Park.

The defamation claim is only against the Defendant, Dennis Whitt, and the issues for your determination are as follows:

(1) Whether Whitt made the false

statements to members of the public alleged by Plaintiff concerning Plaintiff as defined by these instructions; and, if so,

(2) Whether Defendant Whitt's statements concerning Plaintff tended to expose Plaintiff to hatred, ridicule, or contempt, or tended to injure Plaintiff in his occupation or profession.

If the preponderance of the evidence does not support the defamation claim of Plaintiff, then your verdict should be for Defendant, Mr. Whitt.

If, however, the preponderance of the evidence does support the claim of Plaintiff, then you shall consider the defense of privilege raised by Defendant Whitt.

On this defense, the issue for your determination is whether all statements made by Defendant Whitt were privileged.

If the preponderance of the evidence supports this defense of Mr. Whitt, your verdict should be for Mr. Whitt. If, however, the preponderance of the evidence does not support this defense, and the preponderance of the evidence does support the claim of Frank Morgan, then your verdict should be for Frank Morgan and against Mr. Whitt.

And I will define privilege for you in just a moment. A statement or suggestion that a person has committed a crime or criminal acts, or that a person is dishonest, constitutes defamation, per se.

If you find from a preponderance of the evidence that Defendant Whitt stated or suggested that the Plaintiff Morgan committed crimes or criminal acts, you need not make a specific finding that the Plaintiff was damaged, but may

presume that the Plaintiff was damaged, and award him such sum as you believe fully and fairly compensates him for such damage.

The second claim of Plaintiff against the Defendant, Mr. Whitt, individually, is for invasion of privacy.

One who gives publicity to a matter concerning another that places the other before the public in a false light, is subject to liability to the other for invasion of his privacy, if:

(1) The false light in which the other was placed would be highly offensive to a reasonable person; and

(2) The actor had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

If the preponderance of the evidence supports the invasion of privacy claim for Plaintiff, then your verdict should be for Plaintiff Morgan.

If, however, the preponderance of the evidence does not support the claim of Plaintiff Morgan, then your verdict should be for Defendant Whitt.

The Court has found, and now instructs you as a matter of law, that Mr. Morgan, the Plaintiff herein, was a public figure.

A qualified privilege extends to a person who makes statements about a public figure or public official. The privilege protects the maker of such statements, as long as the statements are comment and opinion or are false statements made without malice.

This privilege applies to the case of defamation in this cause.

The third claim of the Plaintiff is for a violation of Title 42 United States Code, Section 1983. In that count, Plaintiff alleges that both Defendants, acting under color of state law, deprived him of rights and privileges guaranteed to him by the United States Constitution, and by an Act of Congress which provides for equal rights of all persons within the jurisdiction of the United States.

The Plaintiff alleges that he suffered or sustained personal injuries as a result of the Defendants' actions, and seeks an award of damages for these injuries.

In particular, the Plaintiff alleges that the Town of Lake Park and Mr. Whitt launched an investigation of Plaintiff in retaliation for Plaintiff's criticism of Mr. Whitt and the Town

government.

During that investigation, the Plaintiff alleges that Mr. Whitt made certain false and defamatory statements. Plaintiff also alleges that Defendant Whitt committed torts of defamation and invasion of privacy.

The Plaintiff alleges that the Defendant took these actions under color of the laws of the State of Florida and the customs and policies of the Town of Lake Park, and therefore deprived the Plaintiff of the rights and privileges secured and protected to him by the constitution and laws of the United States; namely, the constitutional right not to be investigated or otherwise harassed for criticizing public officials, and the right not to be stigmatized based solely on his criticism of public officials.

You are instructed, as a matter of law, that under the constitution of the United States, every person has the right not to be deprived of liberty without due process of law.

Every person also has the right under the constitution to be free from unreasonable searches or investigations.

You are further instructed, that Section 1983 of Title 42 of the United States Code, provides that any citizen may seek redress in this Court by way of damages against any person or persons, who, under color of any State law or custom, subjects such citizen to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States.

Acting under color of state law means, under pretense of law, and simply

means acting in one's capacity as, in this case, police officers or City officials.

The color of law requirement can be satisfied when a person who is affiliated with a state or municipal government has used his position to deprive another of his constitutional rights.

Thus, the color of law requirement can be satisfied where a dispute is motivated by purely personal reasons, provided the alleged misuse of power is made possible because the alleged wrongdoer is clothed with the authority of state law.

As I have said, the Fourteenth Amendment of the federal constitution provides that no state shall deprive a person of his liberty without due process of law.

The liberty of the individual, which the federal constitution thus secures and protects, is not an absolute and unqualified freedom privilege [sic] to do as one pleases at all times and under any circumstances; but is always subject to reasonable restraints, including of course, such restraints as are imposed by law.

The Plaintiff in this case, in common with the Defendants and all other persons living under the protection of our constitution, had the legal right at all times not to be deprived, without due process of law, of any liberty secured or protected to them by the constitution or laws of the United States.

The Plaintiff had a liberty interest in not being stigmatized based solely or substantially on his criticism

of public officials.

To be deprived of liberty without due process of law, means to be deprived of liberty without authority of the law. In order to prove his claim under the civil rights claim contained in this action, the burden is upon the Plaintiff to prove and establish, by a preponderance of the evidence, the following facts:

First, that Plaintiff has been stigmatized in, or as a result of, the investigation process, by false and disparaging allegations of criminal activity.

Second, that Defendant Whitt acted under color of state law, or municipal ordinance, in going to Schwenksville and Collegeville, Pennsylvania to make inquiries and obtain information relating to Frank Morgan.

Third, that these acts and conduct deprived Frank Morgan of his federal constitutional right of free speech, and of his federal constitutional right not to be deprived of his liberty without due process of law.

Fourth and finally, that these acts and conduct proximately caused Frank Morgan to sustain injury to his feelings and to his ability to exercise his right of free speech.

In respect to the 1983 claim as against the Town of Lake Park, the Plaintiff, in order to prevail as against that Defendant, must prove each of the following elements by a preponderance of the evidence:

First, that the Defendant Whitt acted under color of state law, or muncipal ordinance, in going to Schwenksville and Collegeville,

Pennsylvania to make inquiries and obtain information relating to Frank Morgan.

Second, that in undertaking these inquiries and obtaining this information, Dennis Whitt's conduct represented official policy of the Town of Lake Park.

Third, that these acts and conduct deprived Frank Morgan of his federal constitutional right of free speech, and of his federal constitutional right not to be deprived of his liberty without due process of law.

And finally, that these acts and conduct proximately caused Frank Morgan to sustain injury to his feelings, and to his ability to exercise his right of free speech.

An injury or damage is proximately caused by an act, or a failure to act,

whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one person.

On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

The Plaintiff is entitled to receive damages if the Defendant or Defendants took actions which resulted

in a violation of the Plaintiff's rights.

It is not necessary to find that any of the Defendants intended to deprive the Plaintiff of his civil rights, in order to find in favor of the Plaintiff on his civil rights claims.

The Town of Lake Park is a person within the meaning of Section 1983, and may be held liable for violations of civil rights which are the result of Town policy, custom, or practice.

The Town is liable for the acts of [sic: or] orders of Town officials who possess final authority with respect to such actions or orders.

When an official has final authority in a matter involving the selection of objectives or of means of achieving objectives, his choices represent governmental policy.

The Court instructs you, as a matter of law, that the Defendant Whitt possessed final authority to establish municipal policy with respect to his actions, which are the subject of this lawsuit, and that the Town of Lake Park is liable for his actions, if you find those actions to have been unlawful.

Also, the question of whether or not Mr. Whitt properly or improperly expended public funds is not an issue in this case, and should not be considered by the jury in any way in arriving at a fair and impartial verdict in this case. That is another question for another day.

The fact that a particular official--even a policy-making official--has discretion in the exercises of particular functions, does not, without more, give rise to

municipal liability, based on an exercise of that discretion.

The official must also be responsible for establishing final government policy respecting such activity, before the muncipality can be liable.

That is, municipal liability under 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

If you find for the Defendants on each of the claims--that is, on the defamation claim, the invasion of privacy claim and find on behalf of both Defendants as to the 1983 claim--you will not consider the matter of damages.

If you find for the Plaintiff, however, you must then determine what amount of damages, if any, to award the Plaintiff for compensation for his injury.

In arriving at an award of damages in this case, you should consider the following types of damages:

One, you may award the Plaintiff such actual compensatory damages as you find from a preponderance of the evidence, are proximately caused by any acts of the Defendants which were contrary to law.

Two, you may also award the Plaintiff nominal dollars for the deprivation of his constitutional rights.

Third, if you find for the Plaintiff and against Defendant Whitt, you must decide whether it appears from

a preponderance of the evidence in the case that the acts and conduct of Defendant Whitt, toward the Plaintiff at the time and place in question, were willful and with gross disregard for Plaintiff's rights; and if so, what amount, if any, punitive exemplary damages should be added to the award of actual compensatory or nominal damages against Defendant Whitt.

As to Defendant Whitt, you may award punitive or exemplary damages in addition to actual or compensatory, or nominal damages without punitive damages, all in accordance with the facts as you find them and from these instructions.

The fact that Plaintiff's rights have been found to be violated, in itself, entitles him to damages. Therefore, if you find for the Plaintiff

on the issue of liability, you must then fix--

Sorry, I think I got that in here twice. Do I?

MR. GREEN: No.

THE COURT: No? Okay. Therefore, if you decide for the Plaintiff on the issue of liability, you must then fix the amount of money damages which will reasonably and fairly compensate him for the wrongful conduct of the Defendants, which was a substantial factor in bringing about.

In seeking such award, you should consider and may award damages for the following injury and harm:

One, the violation of his constitutional rights to be free from unreasonable investigations.

Secondly, the emotional and mental harm to the Plaintiff during and after

the investigation, including fear, humiliation, mental anguish, and any emotional harm, fear or mental anguish that Plaintiff will, with reasonable certainty, suffer in the future.

And finally, the extent and duration of the injury, as I have said, including their reasonable certainty to continue in the future.

You may also decide whether the Plaintiff is entitled to an award of punitive damages against Defendant Whitt. In a case like this, you may consider whether acts or omissions of Mr. Whitt, if you find them to be proved, were so serious that Defendant Whitt should pay a penalty, so that in the future, others will be deterred from engaging in the same conduct.

Whether you decide to award any punitive damages, should be based on

whether you decide that Defendant Whitt engaged in conduct evidencing ill will, hostility, or evil intention to defame and injure.

In making an award of punitive damages, if any, against Mr. Whitt, you may consider Mr. Whitt's net worth in arriving at a fair and impartial award.

I should caution you, members of the jury, that you may not make an award of punitive damages unless you first find that the Plaintiff is entitled to compensatory damages.

Upon retiring to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court.

A form of verdict has been prepared for your convenience, and I shall now read it to you:

Verdict, we, the jury, return these verdicts--and this is a verdict we call by special interrogatories--and there are a number of questions here, and I'll read those to you.

One, as to the claim of the Plaintiff, Frank Morgan, that his civil rights were violated by the Defendant Whitt, we find--either for the Plaintiff or for the Defendant.

Your foreman or forewoman should insert your finding by putting a check mark in the appropriate box.

The second question is, as to the claim of the Plaintiff, Frank Morgan, that his civil rights were violated by the Defendant, Town of Lake Park, we find--again, either for the Plaintiff or for the Defendant.

Again, your foreman or forewoman should put an X in the appropriate blank

as provided.

Three, as to the claim of the Plaintiff, Frank Morgan, of defamation by the Defendant, Dennis Whitt, we find--either for the Plaintiff or for the Defendant.

There again, a blank space is provided for you to insert your finding.

Four, as to the claim of the Plaintiff, Frank Morgan, of invasion of privacy by the Defendant, Dennis Whitt, we find--either for the Plaintiff or for the Defendant.

Again, there is a blank space provided for you to indicate your finding.

If you answer the first four questions in the negative, as I said, then you do not consider the issue of damages. That is, if you find for the Defendant, in which case you answer the

first four questions in the negative, you should then have your foreman or forewoman fill in the date, sign it, and return it to the court as your verdict.

If you find for the Plaintiff on any of the first four questions, you should then proceed to consider number five:

Compensatory damages for defamation and/or invasion of privacy are hereby assessed in favor of the Plaintiff, Frank Morgan, and against the Defendant, Dennis Whitt, in the amount of--and you will see a blank space is provided with a dollar sign to the left, and you should insert in that blank space the sum that you deem appropriate under the facts and law of the case; making certain to insert dollars and cents.

Question number six, compensatory damages for violation of 42 United

States Code 1983 are hereby assessed in favor of the Plaintiff, Frank Morgan, and against the Defendants, Dennis Whitt and the Town of Lake Park, in the amount of--blank dollar.

And, again, you should insert what amount, if any, you deem appropriate under the facts and law of the case.

Finally, punitive damages are hereby asessed in favor of the Plaintiff, Frank Morgan, and against the Defendant, Dennis Whitt, in the amount of--blank dollars.

And there you should insert whatever finding you may make as to the issue of punitive damages. Punitive damages are an award within your discretion, you may or may not award them. However, as I said earlier, you can not make an award of punitive damages unless you have made an award of

compensatory damages.

You will take the verdict form to the jury room, and when you have reached unanimous agreement as to your verdicts, you will have your foreman or forewoman fill it in, date and sign it, and then return it to the courtroom.

If during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, have it signed by your foreman or forewoman, and pass it to the U.S. Marshal, who will then bring it to the Court's attention.

We will then respond to whatever question you may have, as promptly as possible; either in writing, or by having you returned to the courtroom so you may be addressed orally.

You are cautioned, however, that with regard to any question or message

you may send, that you should never state your numerical division at the time. In other word, don't say, two of us want to know, or one of us wants to know, or five of us think.

(Alternate juror excused with the thanks of the Court)

THE COURT: Certain of the exhibits that have been received in evidence will be assembled and delivered to you by the Clerk in just a few minutes, to assist you in the course of your deliberations.

I remind you, again, ladies and gentlemen, your verdicts in this case must be unanimous; that is, they must be concurred in and agreed in by each of you before it is returned to the Court as your verdict.

With those instructions, you may now retire in the consideration of your verdict.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-8241 Civ-Gonzalez

FRANK MORGAN,

Plaintiff,

vs.

DENNIS WHITT, individually, and in his official capacity, and THE TOWN OF LAKE PARK, a Florida municipal corporation,

Defendants.

JUDGMENT

THIS ACTION came on for trial before the Court and a jury, Honorable Jose Gonzalez, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED that the plaintiff, FRANK MORGAN, recover of the

defendant, LLOYD DENVER WHITT, also known as DENNIS WHITT, the sum of Ten Thousand Dollars ($10,000.00), with interest thereon at the rate of 6.3% as provided by law, and his costs of action, and further recover of the defendants, LLOYD DENVER WHITT, also known as DENNIS WHITT, and THE TOWN OF LAKE PARK, a Florida municipal corporation, the sum of Thirty-Seven Thousand, Five Hundred Dollars ($37,500.00), with interest thereon at the rate of 6.3% as provided by law, and his costs of action.

DATED at Fort Lauderdale, Florida,

on the 27th day of April, 1987.

/S/ Jose A. Gonzalez

United States District Judge

cc: James K. Green Esquire
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-8241 Civ-Gonzalez

FRANK MORGAN,

Plaintiff,

vs.

DENNIS WHITT, ET AL.,

Defendants.

VERDICT

We, the jury, return these verdicts:

1. As to the claim of the plaintiff, FRANK MORGAN, that his civil rights were violated by the defendant, DENNIS WHITT, we find:

__X__ for the plaintiff

____ for the defendant

2. As to the claim of the plaintiff, FRANK MORGAN, that his civil

rights were violated by the defendant, TOWN OF LAKE PARK, we find:

__X__ for the plaintiff

____ for the defendant

3. As to the claim of the plaintiff, FRANK MORGAN, of defamation by the defendant, DENNIS WHITT, we find:

__X__ for the plaintiff

____ for the defendant

4. As to the claim of the plaintiff, FRANK MORGAN, of invasion of privacy by the defendant, DENNIS WHITT, we find:

__X__ for the plaintiff

____ for the defendant

5. Compensatory damages for defamation and/or invasion of privacy are hereby assessed in favor of the plaintiff, FRANK MORGAN, and against the defendant, DENNIS WHITT, in the amount of $1,000.00.

6. Compensatory damages for violation of 42 U.S.C. 1983 are hereby assessed in favor of the plaintiff, FRANK MORGAN, and against the defendants, DENNIS WHITT and TOWN OF LAKE PARK, in the amount of $37,500.00.

7. Punitive damages are hereby assessed in favor of the plaintiff, FRANK MORGAN, and against the defendant, DENNIS WHITT, in the amount of $9,000.00.

SO SAY WE ALL.

DATED this 15 day of April, 1987.

/S/ Joyce M. Taylor

Foreperson

PLAINTIFF'S PROPOSED JURY INSTRUCTION

NO. 12

Municipal Liability

The Town of Lake Park is a person within the meaning of Section 1983 and may be held liable for violations of civil rights which are the result of Town policy, custom, or practice. The Town is liable for the acts of orders of Town officials who possess final authority with respect to such action(s) or orders. When an official has final authority in a matter of involving the selection of objectives or of means of achieving objectives, his choices represent governmental policy. The Court instructs you as a matter of Florida law, that the Defendant Whitt possessed final authority to establish municipal policy with respect to his

actions which are the subject of this lawsuit, and that the Town of Lake Park is liable for his actions, if you find the actions to have been wrongful.

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1921

In The

Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, and THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT, TOWN OF LAKE PARK, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether an allegedly defamatory statement made by a town manager in the course of an inquiry into the public background of a public figure in another state is an action taken "under color of" law when the inquiry is a private one, not connected with the town manager's official duties, and when the manager is accompanied by an off-duty police officer from his town who plays no part in the inquiry.

II. A. Whether this Court should review a decision of a Court of Appeals which found that there was no actual malice proven in respect to allegedly defamatory statements made regarding a public figure when the record discloses that there was no proof that the statements were false or known to be false.

B. Whether this Court should review a decision made by the Trial Court that the Petitioner was a general purpose public figure when that ruling was not objected to or appealed below.

III. Whether the actions of a town manager, taken in respect to a matter which has no connection with a municipal interest and taken without any municipal authority, can be termed a municipal policy under 42 U.S.C. § 1983.

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No. 88-1921

In The

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October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, and THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT, TOWN OF LAKE PARK, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This Respondent agrees with the statement of grounds for jurisdiction provided in Petitioner's Petition, but would suggest that jurisdiction should not be granted.

II. COUNTERSTATEMENT OF THE FACTS

The Petitioner, Frank Morgan, was a former resident of Pennsylvania who retired in 1976, after a career in which he held or sought various political offices in or about Schwenksville, Pennsylvania, including the office of mayor of that town (R5 - 127, 154). In 1978, Morgan moved to Lake Park, Florida, and became involved in the local politics of the community, serving as a member of the Town Planning and Zoning Board and the Merit Board and as a political operative, soliciting other members of the community to run for town office and supporting, organizing and running their campaigns (R5 - 151, 163-164, 134-138).

Lloyd Denver Whitt was Town Manager of the Town of Lake Park from February 17, 1982 until 1986 (R5 - 31; R7 - 488). Whitt and Morgan first met in March or April, 1982, when Morgan was campaigning for a mayoral candidate (R5 - 34-5); approximately a year later, they entered into a political feud which lasted until Whitt left office (R5 - 35). During the next several years, Morgan worked to elect Town Commissioners whom he felt would fire Whitt (R5 - 35, 134-138); accused Whitt of taking kickbacks on purchase of police furniture[1], and criticized him for the adoption of new personnel rules for the Town's employees (R5 - 128, 143). Whitt, in turn, ordered Morgan out of his office on at least on one occasion (R5 - 38).

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[1] An accusation which was the subject of a special investigation that totally exonerated Whitt; Morgan subsequently acknowledged that Whitt has been exonerated (R5 - 168).

Morgan resigned from both of his municipal board positions in January 1984 (R5 - 151). Municipal elections were scheduled for March, 1985, and Morgan actively supported and ran the campaigns of several candidates (R5 - 139; R6 - 320, 339). At the invitation of the editor of a local weekly newspaper – Weekday – Morgan wrote a weekly political column which began appearing in the paper on January 16, 1985 (R5 - 43; R5 - 138-9). The first article, which was critical of Whitt, compared his administration to that of Nazi Germany (R5 - 145). Morgan claimed expertise as a critic of the local administration predicated upon his background as a public official in Pennsylvania (R6 - 447).

In early 1985, the police department in Lake Park undertook the investigation of an employee who was suspected of having submitted false information on an employment application; some evidence indicated that one or more of her superiors had knowledge of the fact that the application contained false information, but had nonetheless approved the application (R5 - 49-51; R6 - 195; R6 - 444). Whitt, whose duties included administrative investigations of employment matters, scheduled a trip to Auburn, New York to determine whether any police department official had previously obtained information of the falsified records, but had suppressed it; he was originally scheduled to be accompanied by the Police Chief, who was concurrently conducting a criminal investigation into the employee's conduct in falsifying the employment application (R5 - 92; R6 - 445). At the last moment, the Chief substituted Sergeant James Tice in his stead; it was to be Tice's function to obtain information

for the possible criminal prosecution of the subject employee (R6 - 445).[2]

When Whitt learned that all flights to Syracuse (the closest airport to Auburn, New York), from West Palm Beach were routed through connections at Philadelphia, he developed the idea of taking the opportunity to make a side trip from Philadelphia to Schwenksville on the way to Syracuse in order to look into Morgan's background as a public official in Pennsylvania (R5 - 47; R6 - 446). His admitted purpose in such a side trip was to learn the true facts regarding the administrative and political expertise that Morgan represented himself as having, and to learn anything of Morgan's political or public background in Pennsylvania which might support a public riposte to Morgan in answer to the charges that the latter had been making against him (R5 - 47).

Whitt called in advance to see if the town of Schwenksville had public records available (R5 - 63). He and Tice left West Palm Beach on January 30, 1985, flew to Philadelphia, rented a car, and drove the following morning to Schwenksville. There they ate at a diner where they had occasion to ask two young men for directions and were directed to the Collegeville Independent newspaper in an adjoining community (R5 - 56-7; R5 - 60). They

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[2] Petitioner suggests in his Petition that this trip was a mere subterfuge to enable Whitt to go to Pennsylvania (Petition, p. 2, 49). This suggestion was raised for the first time on appeal. It was Petitioner's position at trial that it was a legitimate trip – as, indeed, the evidence clearly established. Petitioner's trial counsel stated this unequivocally on opening statement (R5 - 10).

stopped at the newspaper and Whitt asked if back copies of the newspaper were available; he was advised by an office worker, Lynn Nyce, and a columnist, J. Howard Fenstermacker, that the newspaper's file copies were not available except upon permission of the owner, who was on vacation (R5 - 61-2; R6 - 209; R6 - 242). There was some disagreement as to what was said in the course of the 15-20 minute visit; Whitt, Tice (who testified at trial on behalf of the Plaintiff, Morgan) and Fenstermacker all testified that nothing substantively was said in regard to Morgan's character or honesty (R5 - 109; R5 - 122; R6 - 237). Nyce testified that Whitt referred to arson in respect to the purported burning of a trailer owned by Morgan in Pennsylvania, although she did not claim that Whitt accused Morgan of responsibility in the burning (R6 - 210).

Tice and Whitt left the Independent – whose owner, as it developed, was a close friend of Morgan – without Whitt's having viewed the newspaper's file copies (R5 - 61). They spent several hours in Schwenksville, where Whitt spoke to several town officials and the editor of the Schwenksville Item, a newspaper which had opposed Morgan when he was politically active in Pennsylvania politics (R5 - 59-60; R6 - 272-293; R6 - 272-315; R6 - 390-433). Although the Township's official records were made available to Whitt, they were not reviewed; most of the attention was given to reviewing the back file copies of the Item (R6 - 377-379). None of the information sought or obtained by Whitt was outside the public record (R5 - 159-160).

Whitt and Tice then proceeded back to Philadelphia, spent the night, and continued their trip on to Syracuse

and Auburn, New York where they completed their respective investigations and returned to West Palm Beach (R5 - 56-7).

Following Whitt's return, Morgan was contacted by his friend who owned the Collegeville Independent, and told of Whitt's visit (R5 - 130). On February 6, 1985, in his weekly column, Morgan attacked Whitt for inquiring into his political career and background in Pennsylvania, and challenged him to publish the information which he had acquired (R5 - 147-148; R5 - 157; R5 - 161). In response, Whitt complied with the challenge in a column which he wrote in the same newspaper – Weekday (R6 - 452). The Town Commission reacted with disapproval of the rivalry between Whitt and Morgan and requested Whitt to discontinue his column – which he did (R6 - 452-453). Morgan, however, continued writing his column on a weekly basis through the March municipal elections; his last column that year was published in April (R5 - 133; R6 - 453).

Subsequent to this, Morgan remained politically active in the Town of Lake Park, supporting various candidates, including his daughter, for the Town Commission and actively assisting in the campaigns in August of 1985 and March 1986 (R5 - 134-137; R5 - 163-164). During the 1986 campaign, he again published his weekly column (R5 - 139).

Morgan claimed that, as a result of Whitt's inquiry into his political past in Pennsylvania, he became highly

fearful, expecting Whitt to arrest him or bomb his house (R5 - 139).[3]

Several specific factual representations made by the Petitioner bear careful review since they do not accurately reflect the record.

The Petitioner contends that the Town of Lake Park paid for the expenses of Whitt's side trip to Schwenksville (Pet. p. 2, 48, 53). In fact, the record discloses that Whitt carefully paid all of the additional expenses attributable to the detour to Schwenksville of which he – or anyone else connected with the Town – had any knowledge (R6 - 447, 515, 356, 326). He paid the motel expenses incurred by Tice and him; he paid for the rental car they used, and for their meals; he and Tice took personal leave for the two days involved in the side trip (R6 - 447, 513-515). The only expense not paid by Whitt was the difference in airfare caused by taking a layover in Philadelphia rather than simply changing planes. This additional expense was not known until testified to in pretrial discovery by an airline representative (R6 - 515; R6 - 179-181).

The Petitioner also contends that the Town Commission knew of the proposed trip to Schwenksville (Pet. p. 3, 44). This was based on Tice's testimony that Whitt had told him the "Commissioners" knew of the trip; on further inquiry, Tice admitted that Whitt did not specify whether he was referring to the official trip to Auburn, New York, or to the side trip to Schwenksville (R5 - 114). The two commissioners who testified at trial both denied

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[3] Whitt had no arrest powers (R6 – 435).

any prior knowledge of any detour to Schwenksville, and their testimony was not challenged or contradicted (R6 - 322; R6 - 351). Whitt, himself, testified that he only assumed that the Commission members knew he was going on the trip (R5 - 48).

The Petitioner contends that Whitt represented himself to be on official business in Schwenksville when he spoke to the various individuals he met, and that Tice acted – on Whitt's instructions – as though he were on a police investigation, frequently displaying his badge (Pet. p. 15-16). In fact, the testimony of Whitt, Tice and the persons they were in contact with in Pennsylvania were in close agreement that there was never any representation made of official business or an official investigation; that Tice played no role in any of the inquiries, and was merely "along for the ride", and that Tice only showed identification on two or three occasions – and then only when requested by the party Whitt was addressing. Since the Petitioner makes various unfounded assertions regarding what was said or done by Whitt and by Tice in Pennsylvania, a brief review of each witness's testimony is useful in correcting the false impression given by Petitioner.

Tice testified that he never heard Whitt make any derogatory comments about Morgan (R5 - 122); that he was not in Pennsylvania on official business, and never told anyone in Pennsylvania that he was on official business (R6 - 191-192; R6 - 194); that he carried his police identification with him for his work in New York, and showed it in Pennsylvania only when specifically asked by a third party (R6 - 194-195); although Whitt made no derogatory comments about Morgan, one of the young

men in the Schwenksville diner referred to Morgan as a "crook" (R5 - 122).

Fenstermacker testified he was present the entire time Whitt was at the Independent (R6 - 246); neither Whitt nor Tice accused Morgan of any criminal activity (R6 - 237-246); Whitt asked if he knew Morgan and indicated that he was looking into Morgan's background (R6 - 233-234, R6 - 236).

Gary Bell (one of the two young men at the diner) testified that Whitt and Tice approached him and asked for directions (R6 - 262); they also casually asked if he knew Morgan or knew where they could find information on him (R6 - 263); neither Whitt nor Tice called Morgan a crook or made any reference to criminal misconduct by Morgan (R6 - 266-268).

Ronald Hacker (the other young man spoken to at the diner) testified that he and Bell originally thought Whitt and Tice were newspaper reporters since they did not identify themselves at first; later one showed him an identification ID card or badge (R6 - 253, 262); neither Whitt nor Tice mentioned the purpose of their trip (R6 - 251); he recalled and mentioned to Whitt that a fire had burned down a place owned by Morgan in Pennsylvania (R6 - 256); he believed that Bell mentioned something about a trailer fire (R6 - 257).

Clarence Grimly, borough superintendent in Schwenksville, was told that Whitt wanted background information on Morgan and was going to examine Town records (R6 - 275). No one ever referred to Whitt or Tice's actions as an investigation, and there was no mention of criminal conduct or investigation (R6 - 276, 278); neither

Whitt nor Tice made any representation that they were conducting a police investigation (R6 - 281); Whitt gave him a business card but Tice showed him no badge or ID (R6 - 282); Whitt specifically advised Grimly that he was there in a personal rather than a business capacity (R6 - 282); Whitt never accused Morgan of any criminal actions (R6 - 292), and, while Whitt may have said that he would have liked to lock Morgan up, this was a desire held by many people in Schwenksville who knew Morgan (R6 - 282-283).

Richard Schlick, mayor of Schwenksville, testified that Whitt asked if public records were open and available and was told they were; Whitt said he was looking for background information but made no claim that he was on a criminal investigation (R6 - 295); Whitt gave him a card and Tice mentioned that he was a police sergeant, but showed no ID (R6 - 299, 302).

Francis Kuhn, the police chief of Schwenksville, testified that he spoke with Whitt who was with another man (R6 - 372); Tice showed no ID or badge (R6 - 373); Whitt told him that he and Tice were en route to New York and were making a side trip to Schwenksville (R6 - 374); Whitt asked him about Morgan – Kuhn had been police chief when Morgan was mayor – but did not say he was investigating Morgan (R6 - 374-375); Whitt told him that they were not in Pennsylvania on official business (R6 - 379), and that he was paying for that part of the trip personally (R6 - 378); Whitt never accused Morgan of criminal activity (R6 - 387).

Bruce MacBain, owner of the Schwenksville Item, testified that he met Whitt in Schwenksville and asked

both Whitt and Tice to show him identification (R6 - 396); Whitt told him they were on their way to New York on another matter and were taking the day off (R6 - 397); Whitt told him he was looking into Morgan's background, but did not say or give the impression it was a criminal investigation (R6 - 400); since MacBain was a newspaperman, he specifically asked if this was a criminal investigation, and Whitt replied it was not; when asked who was paying for the trip, Whitt advised him that the Town was not paying for the side trip to Pennsylvania (R6 - 429, 431-432).

Lynn Nyce, the office worker at the Collegeville Independent when Whitt visited in 1985, and now the editor, testified that Whitt asked for back issues of the paper to find information on Morgan (R6 - 206, 209). She testified that Tice introduced himself and showed her a badge, but did not say whether he did it upon request, as he testified, or without request (R6 - 208); she said Whitt spoke of some of Morgan's property burning mysteriously and mentioned arson – but she did not testify that Whitt accused Morgan of the arson (R6 - 210); she further said that Whitt said he was going to get information which would put Morgan in jail (R6 - 210). Nyce, whose testimony provided almost the sole basis of the Petitioner's claim, never testified that Whitt or Tice represented that the trip was an official one, or that it was a criminal or administrative investigation being conducted on behalf of the Town.

Finally, the Petitioner indicates that the former police chief of Lake Park, Donald Riccardi, testified that Whitt

had "suggested" that he dig up some dirt on Morgan and let Morgan know that he had it (Pet. p. 44). Morgan cites this to suggest that Whitt had been attempting to use his office to harass Morgan over a period of years. In fact, Riccardi testified that he came to Whitt complaining that Morgan was becoming a "pain in the neck" to him and the police department with his constant complaints. Whitt, according to Riccardi (who was a friend of Morgan's and a political opponent of Whitt) suggested that the way Riccardi could get Morgan off his back was to uncover information on him and threaten to use it (R5 - 81-82). Whitt denied this discussion, but, even if it occurred, it was clear from Riccardi's testimony that Whitt was not asking Riccardi to do this for Whitt; rather, Whitt was casually suggesting it as a tactic Riccardi could use if he (Riccardi) felt sufficiently troubled by Morgan. At the time of the alleged discussion (early 1983), it does not appear that there had as yet developed any ill will between Whitt and Morgan.

III. REASONS FOR DENYING THE PETITION

Review by Certiorari is not a matter of right, but of judicial discretion. It should be granted only when there are special and important reasons for doing so. Sup.Ct.R. 17.1. The Petition presents no basis for such review. On the contrary, the decision below was correct and should not be disturbed.

A.

THE DECISION BELOW PROPERLY HELD THAT THE ACTIONS OF DENNIS WHITT WERE NOT TAKEN "UNDER COLOR OF" LAW WHERE THERE WAS NO SHOWING THAT HE ACTED IN CONCERT WITH THE POLICE OFFICER WHO ACCOMPANIED HIM AS A BYSTANDER, AND WHERE HE DID NOT ACT TO DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS THROUGH THE POWER OF HIS OFFICE.

The Petitioner contends that the Eleventh Circuit's reversal of the judgment below upon the basis that Dennis Whitt was not acting "under the color of" state law conflicts with established case law on two counts: first, that Whitt acted in concert with James Tice, a police sergeant, and, second, that Whitt availed himself of the powers of his office to deny the Petitioner his constitutional rights. A proper review of the factual support for each of these contentions, considered together with the case law relied upon, shows that the Eleventh Circuit's decision was in accordance with existing authorities. Review should, consequently, be denied.

The Petitioner contends that Whitt acted in concert with Tice, relying upon Tice's authority as a police officer to effectuate a deprivation of Petitioner's constitutional rights. In fact, the evidence established the opposite. No witness, including Lynn Nyce, testified that Sergeant Tice participated in any way in Whitt's discussions and inquiries. Tice, himself, testified that Whitt advised everyone he spoke with that Tice had nothing to do with his inquiries, and that he was just "along for the ride" (R6 - 196).[4] Tice testified that he did show his police ID card,

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[4] Tice testified as Petitioner's witness.

but only when he was asked to do so by the person Whitt was talking with; he never volunteered his ID (R6 - 195). The only witnesses who testified that Tice showed his ID were MacBain, Hacker and Nyce. MacBain's testimony accorded with Tice's that Tice showed him identification only when MacBain asked to see it (supra pp. 10-11). Hacker testified that neither Whitt nor Tice identified themselves at first, leading him to think they were newsmen; one later showed him an ID. Hacker does not mention whether the ID was shown at Tice's initiative or upon the request of Hacker (supra p. 9). Nyce also testified that Tice showed her an ID or a badge, but does not say whether it was upon a request or upon Tice's initiative (supra p. 11). Thus the uncontradicted evidence established that, while Tice may have shown an ID on 3 occasions, it was done only when the person being addressed asked him for some identification. A number of witnesses confirmed that Tice played no role in the inquires, and testified that they were told that he was not involved in the inquiry (supra pp. 9-11). It was never contended by the Petitioner that Tice had any authority which could be exercised in Pennsylvania. In the cases relied upon by the Petitioner, persons acting in concert with police officers, who were themselves acting with the authority of their office, were found to be acting "under color of" state law. That situation is quite different from the case here where Tice played no role in the inquiry, and was only "along for the ride"; where his role – or, more properly, lack of role – was explained to the people who were approached; where he showed his ID only for identification purposes to those who requested identification, and where he had no real or pretended authority.

In *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), an off-duty policeman serving as a security guard arrested a complainant for shoplifting; his acts were imputed to his employer since there was evidence that, even though he was "off-duty", he acted with his official arrest powers. In *Booker v. City of Atlanta*, 776 F.2d 272 (11th Cir. 1985), summary judgment for the defendant was reversed because there was some evidence to indicate that he was accompanied by a police officer acting within his jurisdiction in attempting to effect repossession of a car. In *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), a guardian ad litem was held to have acted under color of state law because he acted in concert with state officials who confined the plaintiff in a hospital. Finally, in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), the Court held that involvement by police, who accompanied a landlord in an eviction matter, was so great that the eviction had crossed the line between a private action and a state action, and held the landlord to have been acting in concert with the police.

In each of these cases, the police officer, or other official with whom the private citizen was held to be acting in concert, was actively involved in the undertaking (in some cases as the primary party) and was acting within the scope of his jurisdiction and power. Neither situation pertained to the present cause.

The Petitioner also contends that Whitt availed himself of the powers of his office in allegedly denying him his constitutional rights. The deprivation of rights complained of by Morgan was the alleged loss of liberty interest in his reputation caused by Whitt's comments in Pennsylvania in the course of his inquiries into the public

background of Morgan. The Petitioner fails to demonstrate how Whitt was enabled to accomplish this alleged deprivation by virtue of the power of his office. Whitt did not seek records or information which were not open and public matters. There was no evidence that he was able to make the comments that he was alleged to have made or to endow them with any effect by virtue of his being a Town Manager in Lake Park, Florida.

The cases relied upon by the Petitioner do not support his position. In *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (*en banc*) the action taken "under color of" state law was the act of entrusting a marked sheriff's car to a jail trustee, enabling him to stop and assault the decedent. There was no question that the act of entrustment was an official act by the sheriff pertaining to his office. In *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1984) (*en banc*), the action taken "under color of" state law was the assessment and computation of a prisoner's term by two prison records officers at the request of the warden. In *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981) the action of a game officer who stopped the Plaintiff and assaulted him were held to be "under color of" state law where the officer was in uniform, had his official vehicle and stopped the Plaintiff on property controlled by the game department. In *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981) the actions of a judge acting in excess of his jurisdictional authority in having a Plaintiff incarcerated were held to be under color of law. There, although the judge exceeded his authority, the actions taken were ones which, if taken with proper jurisdiction, would have had the force of law. In *Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988), various state officials

acted in concert with a grower's association giving the latter aid within the state legal processes. These actions were held to be under color of law.

In contrast to the cited cases, the evidence here did not show that Whitt represented himself as acting in an official capacity; he undertook no actions injuring the Plaintiff which he was enabled to undertake by the fact that he was a Town Manager, and the evidence from most of the witnesses was that Whitt expressly disclaimed acting in any official capacity. Those witnesses who did not testify that he disclaimed acting with authority gave no testimony on that subject at all. The evidence established that Whitt had no authority to conduct an investigation of Morgan since his only investigatory powers were in reference to municipal employees or officials, and Morgan was not a municipal official or employee. Since Whitt's interest and statements in respect to Morgan solely related to Morgan's political activities in Pennsylvania, there was not even a color or appearance of official authority lent to his actions as a Town Manager in Florida.

B.

THE DECISION BELOW PROPERLY HELD THAT THE JUDGMENT UPON THE DEFAMATION COUNT SHOULD BE REVERSED.

(1)

THERE WAS NO SHOWING THAT THE STATEMENTS ALLEGEDLY MADE WERE FALSE OR THAT WHITT KNEW THEY WERE FALSE.

The Petitioner attempts, by his second argument, to shoehorn the present case into one side of a purported

conflict between circuits upon the issue of the independent assessment of evidence of actual malice prescribed in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949 (1984). This effort is ill-taken. The Petitioner contends that the Eleventh Circuit, below, applied the broad interpretation of de novo review suggested in *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (*en banc*), to include appellate review of the credibility findings made by a jury in a defamation action brought by a public official or public figure. In fact, the Circuit Court below gave no indication that it reviewed the jury's decisions on witness credibility on the defamation claim.

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), established the rule that, in defamation suits brought by public officials, the plaintiff could prevail only upon a showing of actual malice . . . i.e. a showing that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. Proof of this actual malice must be made by clear and convincing evidence. The Sullivan doctrine was extended to public figures in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974). In *Bose*, this Court held that appellate courts must engage in an independent assessment of the evidence "germane to the actual-malice determination" *id.* 466 U.S. at 514, 104 S.Ct. at 1967. This Court further held in *Bose* that

> The burden of proving "actual malice" requires the Plaintiff to demonstrate with clear and convincing evidence that the Defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.

id. 466 U.S. at 511, 104 S.Ct. at 1949 (ftn. 30).

This formula recognizes that the Plaintiff has the burden to show that the statement is 1) false, and 2) uttered with knowledge of its falsity or with serious doubt as to its truth.

The record below was completely silent on the matter of whether any of the statements purportedly made by Whitt were true or false; it was equally silent on Whitt's subjective knowledge either by direct or circumstantial evidence. The Petitioner claims that Whitt accused him of arson committed on his property in Pennsylvania, and said that he wanted to "lock him up". In fact, testimony of comments about arson or about Morgan's property burning came from only two witnesses: Lynn Nyce and Donald Hacker. Nyce testified that Whitt remarked that some of Morgan's property burned, and mentioned arson (R6 - 210). She never testified that Whitt accused Morgan of the arson, and she never testified that arson did not occur with respect to Morgan's property. Hacker testified that he told Whitt that some of Morgan's property in Pennsylvania had burned, and that either his friend, Gary Bell, or Whitt mentioned something about a trailer burning (R6 - 256-257). In respect to neither incident was arson discussed in the conversation with Bell and Hacker.

Finally, Morgan's testimony about this point – which point was the linch-pin of his suit – was totally silent. He neither confirmed nor denied that he had property in Pennsylvania which burned (as a result of arson or otherwise), and he produced no evidence in any other form that would indicate that Whitt's alleged statement, testified to by Nyce, was false.

Not only did Morgan fail to establish that the alleged statement was false (or even defamatory, since it was never shown that the accusation of arson, even if made by Whitt, was directed at Morgan), but he likewise failed to put on any evidence of Whitt's subjective knowledge of the truth or falsity of the statement.

Similarly, Whitt's alleged comment regarding his wish to "lock up" Morgan was not a statement of substance or fact, but only an indication of a desire or a fond hope. As such it is not defamatory under Florida law. See *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla. 1st DCA 1981).

Even had the Eleventh Circuit applied a "clearly erroneous" standard of review without an independent assessment of the evidence of actual malice, a reversal would have been mandated, for the record was totally void of any evidence to support this critical and essential element in the Petitioner's case. *A fortiori* a reversal would also have been mandated under the independent assessment rule prescribed in *Bose*.

(2)

THE PETITIONER DID NOT COMPLAIN BELOW OF HIS CHARACTERIZATION AS A GENERAL PURPOSE PUBLIC FIGURE AND SHOULD NOT BE ALLOWED TO RAISE IT FOR THE FIRST TIME IN THIS COURT.

The Petitioner also contends that the Eleventh Circuit improperly held him to be a general purpose public figure rather than a limited purpose public figure. This contention must fall since the designation of Petitioner as a general purpose public figure was made by the Trial

Court without objection from the Petitioner, and was not appealed by the Petitioner (R6 - 474). In short, it is an issue complained of for the first time in this litigation in the Petition for Certiorari. On this ground review should be denied. *FTC v. Grolier, Inc.*, 462 U.S. 19 at 23, 103 S.Ct. 2209 at 2212 (1983).

C.

THE DECISION BELOW CORRECTLY HELD THAT WHITT'S ACTIONS DID NOT CONSTITUTE MUNICIPAL POLICY WHERE THERE WAS NO SHOWING THAT THE ACTIONS WERE WITHIN THE AMBIT OF MUNICIPAL INTEREST OR AUTHORITY.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, (1978), this Court held that a municipality could itself be held liable under 42 U.S.C. § 1983 where the action producing the deprivation of Federal Constitutional or statutory rights was taken in implementation of official municipal policy. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986), this Court held that a single action, when undertaken pursuant to a decision by one who "possesses final authority to establish municipal policy with respect to the action ordered", Id. 106 S.Ct. at 1299, can result in municipal liability since the decision thus made constitutes municipal policy. In *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), this Court held that whether a municipal official possesses the requisite final authority to establish municipal policy is a matter of state or municipal law.

The Petitioner argues that the Eleventh Circuit, in the decision below, ignores the holding in *Praprotnik* that state or municipal law determines whether an official

possesses final authority to establish municipal policy. This argument misunderstands the holding below. The Eleventh Circuit did not suggest that the question of whether Whitt possessed final authority to establish municipal policy for the Town of Lake Park was anything but a matter of state and local law. What it did hold was that a municipal policy was not involved.

The Petitioner in his petition – as well as in his briefs to the Eleventh Circuit – has consistently avoided identifying the municipal "policy" which he contends was established by Whitt, the implementation of which allegedly deprived Petitioner of his constitutional rights. He points to Whitt's power over Town personnel, and his power to expend funds on behalf of the Town. These powers, however, are less extensive than the Petitioner contends, and, of more decisive importance, the actions of which he complains were not taken pursuant to any of these powers.

The gravamen of Petitioner's claim was that he was deprived of a liberty interest in his good name by the comments made by Whitt while in Pennsylvania on a personal fact finding inquiry. At the time, the Petitioner was not a municipal employee or official, and the comments and inquiries made by Whitt that allegedly defamed the Petitioner did not concern any action or conduct by the Petitioner as an employee or official of the town of Lake Park. No witness ever testified that Whitt, while in Pennsylvania, claimed to be on an official investigation on behalf of the Town. On the contrary, the majority of the witnesses – and all who gave any testimony upon the subject – testified that Whitt was explicit in advising that he was not undertaking an official investigation (supra pp. 9-11). Similarly, although he was

accompanied by Sgt. Tice, there was no evidence that Tice took any active role; rather, both Tice and a number of those with whom Whitt had contact in Pennsylvania testified that it was made clear that Tice had no role in the inquiry (supra pp. 8-11). Although it developed that the airfare incurred as a result of the day and a half layover in Pennsylvania added almost $200.00 to each ticket, there was no showing that this fact was known to Whitt who otherwise covered personally all of the additional costs added to the trip by the detour in Pennsylvania.[5] Under such circumstances it can hardly be said that Whitt was making a policy decision on behalf of the Town to pay for his additional airfare. More importantly, it was not a policy of municipal assumption of the incremental travel expense which the Petitioner claims resulted in his deprivation. Instead, it was the inquiry into his background in Pennsylvania – an inquiry made only into matters upon the public record – and certain alleged comments in reference to arson in respect to a trailer owned by the Petitioner in Pennsylvania which constituted the conduct identified by the Petitioner as resulting in his deprivation of rights.

The Petitioner analogizes the alleged conduct of Whitt to the action of a city manager who orders the police department to arrest all black persons in a town out of personal vindictiveness. This attempted analogy exposes the essential flaw in the Petitioner's contention

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[5] The Petitioner omits to advise the Court that the Trial Judge ruled that the additional airfare expense was irrelevant to the issue of municipal liability (R6 - 516). The Petitioner never challenged the ruling.

that Whitt was here establishing municipal policy. If reference to the hypothetical town's charter or to state law revealed that the city manager had the final authority to determine arrest policy for the city,[6] then the action, even if unconstitutional, would be an action within the ambit of his authority. It would be an illegal use of legal power. No one would quarrel with the contention that arrest policies are properly the subject matter of municipal interest and, hence, may be properly termed municipal policies. Thus an unconstitutional arrest policy is nonetheless a municipal policy. Slanderous statements made by public officials unconnected to the performance of a municipal duty, on the other hand can hardly be termed matters of municipal policy for the utterance of statements, *without more*, is not a matter of municipal concern. The attempted analogy with the improper use of arrest powers must fall.

The Petitioner's contention that Whitt's conduct became municipal policy by ratification by the Town Commission is totally without merit. The Petitioner did not allege ratification, and no such issue was framed for the jury. It is an argument created and raised initially on appeal. Considered upon its substance, this argument is equally lacking in merit. There was not evidence that the Town Commission, or any of its members, had any knowledge that the side trip to Pennsylvania had cost the Town any incremental expenditure. It can hardly be suggested that the Commission ratified the actions of Whitt

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[6] Of course, in the absence of such final power, even if a manager gave an order and the order was carried out, there would be no municipal liability. *Proprotnik*, supra.

by rendering him financial support when there was no knowledge that any expense was incurred. The further suggestion that the Commission accepted his conduct subsequently without dissent has no support in the record. The *only* evidence of how the Commission viewed the situation between Whitt and Morgan subsequent to the visit to Pennsylvania was the testimony that Whitt was advised of the Commission's displeasure and requested to stop publishing his counter-columns in the local newspaper (R6 - 453).

Under none of the arguments raised by the Petitioner could it be said that Whitt was acting to establish a municipal policy which resulted in deprivation of the Petitioner's constitutional rights. The Petition should be denied on this ground.

IV. CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 88-1921

In The

Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually, and in his official capacity, and THE TOWN OF LAKE PARK, FLORIDA

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

Frank Morgan, at all times material hereto, was a resident of the Town of Lake Park. Mr. Morgan actively participated in the Town's political process by soliciting and actively supporting the candidacy of several persons. Mr. Morgan also held a seat on one of the Town's appointed boards. In January, 1985, Morgan began to write for *Weekday*, a local weekly newspaper.

Whitt was the Town Manager of the Town of Lake Park, and as such, was appointed by the Town Commission. In that capacity, Whitt was the chief executive officer overall in charge of personnel.

In late 1984, a police dispatcher came under investigation. This dispatcher averred that she possessed a high school diploma when, in fact, she did not have same. Apparently, the investigation at the time she was hired was not properly conducted. As a result of the investigation performed by Whitt and Sgt. Tice, civil service charges and a charge of perjury were brought against said dispatcher. (R5/49)

In January, 1985, Morgan began to write for *Weekday*. Some of the articles were critical of Whitt. In late January, 1985, Whitt and Sgt. James Tice travelled to the State of New York for the purpose of investigating the qualifications of the dispatcher. The flight arrangements made included a scheduled stopover in Philadelphia, and during this stopover, Whitt visited Morgan's former place of residence.

The above overview is more fully discussed below. The pertinent facts are discussed more fully in topical fashion below.

Morgan's Political Activities

Morgan had been actively involved in Town politics and had solicited persons to run for town office. Morgan was active in publicly supporting the campaign of Max Mickley. (R5/336) Morgan also solicited Lenny Cottrell to run for Town Commission. (R5/138, R6/320) Later, Cottrell was advised by Morgan that he could no longer support Cottrell because Cottrell did not vote to fire Whitt. (R6/348)

Morgan approached Gil Watts to run for Town Commission. (R5/138, R6/347) Morgan accompanied Watts to Town Hall to qualify for election. It was on this visit that they met Whitt and at this time, which was Watts' first encounter with Whitt, that Morgan told Whitt to meet the man who was going to fire him. (R5/348)

Morgan continued to be involved in tc . politics. At one point, Morgan, in discussing the furniture purchase, inferred that Whitt received kickbacks from the furniture vendor. This statement was made in the presence of Pastor John Miller, Gil Watts and Lenny Cottrell. (R6/317, 321) Later, Morgan denied this and claimed that he, in fact, displayed a report exonerating Whitt.

Morgan's Articles

Morgan began to write for *Weekday* in January, 1985, and continued until April 3, 1985. (R5/139) He later wrote at least one article in March or April of 1986. (R6/454) Morgan's articles criticized Whitt's performance and were written in the form of a column.

Morgan wrote in one article that Whitt had violated his oath of office and was allowing a member of the Town's Commission to violate a municipal ordinance. (R5/143) In essence, the Town Commissioner had declined to take a salary which Morgan felt, under the Town's Charter, was mandatory. The Town Commissioner did elect not to receive a salary.

In a second article, Morgan wrote that Whitt's actions rekindled memories of the 1930's when Hitler was coming to power with the Nazi party. (R5/145, 146).

The Trip

Whitt and Sgt. James Tice travelled from West Palm Beach, Florida to Auburn, New York. Whitt was going to investigate the background check which had been performed on the dispatcher, and Tice was to verify that the employee did not have a high school diploma. (R5/49, 51, 93, R6/444) When making flight arrangements, Whitt found that there was not a direct, non-stop flight to Syracuse, the closest city to Auburn, and found that a flight connected through Philadelphia. (R5/47, 180) Whitt decided to utilize the stopover in Philadelphia to review Morgan's background and respond to Morgan's allegations. (R5/47, R6/180)

Tice received compensatory time, not straight pay, for the Pennsylvania portion of the trip. Whitt charged all expenses related to the trip, but only sought reimbursement for the air fare and the Syracuse automobile rental. The other expenses relating to the Pennsylvania portion of the trip were paid for by Whitt. (R5/70, 114) A fare

increase of $179.00 was incurred due to the stopover, but Whitt was unaware of this additional cost. (R6/177)

Tice accompanied Whitt on the trip to Pennsylvania but did not have any official duty in Pennsylvania. (R5/113, 120, 123, R6/195)

The first stop in Pennsylvania was a small diner located in Schwenksville. (R5/104) There, Whitt and Tice encountered two young men. Whitt asked if they knew Morgan, and one of the young men called Morgan a crook. (R5/104)

Whitt and Tice then travelled to the *Collegeville Independent*, a local newspaper. Prior to entering, Whitt told Tice to show his identification because people would show them more if he identified himself. (R5/103) At the *Collegeville Independent*, Whitt asked to see the archives regarding Morgan. (R5/61, 106) He was told that no one present could authorize the review.

While at the *Collegeville Independent*, they spoke to Lynn Nice. She stated that Whitt told her that Morgan had been involved in a land deal that could be lucrative to him and that some properties had mysteriously burned. (R6/210) Nice testified that she felt that Morgan was a person that she did not want to know. (R6/210) J. Howard Fenstermacher was also present but did not recall the discussion. (R6/246)

Whitt had contacted the Police Chief[1] and Mayor of Schwenksville to arrange an appointment with them.

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[1] Whitt proferred testimony to the trial court of Frances Kuhn, Police Chief, wherein Mr. Kuhn testified that mysterious fires were investigated as arson. The court below ruled said testimony inadmissible.

Whitt and Tice went to Schwenksville Town Hall and met with several persons and received copies of *Schwenskville Item*, a local paper. Minutes of various meetings were likewise made available to Whitt and Tice. (R6/287, 289, 275, 295) Some of those present felt that Whitt was investigating Morgan, but did not perceive it as a criminal investigation. (R6/276, 283, 289, 295). Whitt stated that he was there in his personal capacity. (R/282). Interestingly, only Nice had a dislike for Morgan because of the meetings. Those who knew Morgan said Morgan's reputation were not affected.

Post Trip Activities

Following the return of Whitt and Tice from the trip, Morgan learned of the trip by way of a telephone call from his friend, John Stuart, the owner of the *Collegeville Independent*. Morgan wrote an article shortly after Whitt's return asking that Whitt disclose whatever he learned about Morgan at the next council meeting. Whitt published two articles in the format of letters to the editor, which included his opinions and republished some items which were given to him by the editor of the *Schwenksville Item*.

Most notably, Morgan continued to write for *Weekday* until April 3, 1985. (R5/139) In March, 1985, Morgan asked Betty Bache to run for Town Commission. Mrs. Bache declined. In August, 1985, Morgan again asked Mrs. Bache to run for Town Commission and this time she accepted, and received Morgan's active support. (R6/38) Morgan assisted Bache in her campaign by arranging for signs, suggesting wording for flyers, and

assisting with the collection of campaign funds. Mrs. Bache rejected some of the wording that Morgan proposed for her brochure as they referred to police state tactics. (R6/330) Morgan told Bache that he wanted Whitt fired. (R6/330)

Morgan continued to be involved in politics and in the spring of the following year, Morgan supported his own daughter's candidacy over Betty Bache, using the same signs he had given to Bache the previous year. (R6/330, 332)

During 1985, Morgan also supported the candidacy of Martha Guard for Town Commission and Mayor. (R6/339) Morgan provided Guard with signage and advice, and hosted candidate meetings in his own home. (R6/340, 341) Again, Guard was elected and after failing to fire Whitt at Morgan's request, Morgan supported Guard's opposition the following election. (R6/341, 342) Morgan later wrote at least one article in April, 1986 for *Weekday*. Morgan claimed that as a result of Whitt's actions, he was frightened, lost sleep and was afraid that he might be killed or his home bombed.

Proceedings Below

Morgan sued Whitt under theories of defamation, invasion of privacy and violation of 42 U.S.C. Section 1983. Morgan also brought an action against the Town of Lake Park. At the trial below, the trial court ruled as a matter of law that Morgan was a public figure. (R7/596). The matter went on to jury trial and the jury awarded Morgan $37,500 as compensatory damage against both defendants on the violation of 42 U.S.C. Section 1983,

$1,000 against Whitt for defamation/invasion of privacy, and $9,000 in punitive damages.

Motions for a new trial and judgment n.o.v. were denied. An appeal was taken to the Eleventh Circuit Court of Appeal. The Eleventh Circuit Court of Appeal reversed, holding that Morgan had failed to show that Whitt's actions were under color of state law; that there was no showing of falsity and no showing of actual malice, as required.

It is noted that the trial court found Morgan to be a public figure and instructed the jury in that regard. (R5/596) The petitioner did not challenge this finding at the Circuit Court below. The finding of the trial court was based, in part, upon Morgan's active and vocal involvement in town politics, and service on at least one town board.

SUMMARY OF ARGUMENT

THE COURT SHOULD NOT GRANT PETITION FOR CERTIORARI FOR REASONS MORE FULLY OUTLINED BELOW

There is no conflict between the Eleventh Circuit ruling below and other applicable Section 1983 decisions rendered by this court or other federal courts. In this instance Whitt did not act as an official, the actions of Whitt were taken well beyond geographical limits of his authority, could not be considered as misuse of his authority, did not purport to be taken in his official capacity, and Whitt did not receive any special consideration.

The Eleventh Circuit review of the case below was proper, and after review of the record found that Morgan, a public figure, did not show clear, convincing evidence that Whitt made false and defamatory allegations with actual malice. The court below found that there had been no showing that the comments made by Whitt were false.

ARGUMENT

POINT ONE

THE DECISION OF THE ELEVENTH CIRCUIT THAT WHITT'S ACTIONS WERE NOT TAKEN UNDER COLOR OF STATE LAW WAS PROPER AND IN CONCERT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

The court below properly ruled that Whitt was not acting under color of state law and thus was not subject to liability under §1983. The court below did not come in conflict with this Court's rulings or the rulings of other circuit courts of appeal by virtue of its reversal of the judgment of the trial court.

Title 42 U.S.C. §1983 is an appropriate basis for relief where one person has deprived another of rights or interests secured by the Constitution or laws of the United States and where such actions were taken under color of state law, state statute, ordinance, custom or usage. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The action or conduct which causes the deprivation of a protected right must be fairly attributable to the state. This requires a two part inquiry. First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a person for whom the state is responsible.

Secondly, the persons responsible or charged with the deprivation must be a person who may fairly be said to be a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). The elements of this inquiry seem to merge when the alleged actor is an official of the state.

Admittedly, actions under Section 1983 have been held to lie where an official abuses the authority which he possesses by virtue of an elected or appointed position. *Brown v. Miller*, 631 F.2d 408 (Cir. 5, 1980). However, this case does not fall within the scope of such abuse.

Likewise, an action which is taken by an official not in the scope of his authority will not result in liability simply because the actor is possessed of a government title. *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981). This approach is applicable to the case at bar.

In the case at bar we find that Whitt was travelling with Sgt. Tice to upstate New York to conduct an investigation of a city employee. When Whitt learned that the plane would have a stopover in Philadelphia, it was then that he decided to undertake a private side trip. On this side trip, Tice, who accompanied Whitt, took compensatory time and repeatedly indicated that he was not on official business. (R6/113,120,123). Whitt paid for the costs incurred in this side trip, including hotel rooms, rental car and meals. Whitt submitted a request for compensatory time for the duration of this Pennsylvania portion of this trip. Whitt visited two newspapers and had discussions with public officials and sought items of public record or items which had been published by one of the two newspapers he visited. At no time did Whitt

employ any official requests from his office or the office of the chief of police for the material in question.

When reviewing the public archives, Whitt advised that he was there in his personal capacity. The material was not secured by way of any search warrant, request made by the public agency, nor by any computer based inquiry system such as the National Crime Information System. In fact, the information which Whitt obtained was nothing more than what an interested citizen could have received. Whitt received no consideration due to his position, nor did he at any time attempt to exercise or purport to exercise any authority of his position or the position of the Town of Lake Park Police Chief. It is clear that Whitt did not have any authority within the State of Pennsylvania, and for that matter, neither did Sgt. Tice.

The information which Whitt received was used in articles which were published in a local Lake Park newspaper. In fact, Whitt's articles were published in the same newspaper which had published Morgan's. Certainly, Mr. Whitt is entitled to utilize his own rights of free speech to respond to the vicious criticisms directed against him. Whitt did not utilize any authority that he possessed, but rather exercised his rights and liberties given to him by the United States Constitution.

Morgan urges this Court to grant his petition, indicating a much lower level of state action is required. Toward that end, the petitioner cites *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc). In *Nishiyama*, the sheriff and his deputy allowed a "trusty" to have use of a patrol car for the purpose of running their business and personal errands. During the course of

one of these "errands", the trustee utilized the flashing lights of the patrol car to pull over the young victim. The Sixth Circuit noted in its opinion that representatives of the sheriff's department had received complaints from others that one of their cars was making unauthorized traffic stops. Clearly, the inmate had been granted authority to utilize the car and it was the misuse of this authority which lead to the Sixth Circuit Court of Appeal finding that a cause of action had been stated.

The common thread running through all of the cases cited by petitioner is that there had been a misuse of authority. The authority, however, was misused within the jurisdiction of the actor. For example, in *Layne v. Sampley*, 627 F.2d 12 (6 Cir. 1980), the plaintiff was shot by a police officer who while off duty was carrying a gun under specific grant of authority and pursuant to state statute. In *Lusby v. TG&Y Stores, Inc.*, 749 F.2d 1423 (10 Cir. 1984), an off duty police officer working within his own jurisdiction identified himself as a municipal police officer and arrested the plaintiff below. During the course of an ensuing struggle, the off duty police officer apparently struck one of the plaintiffs with a pistol. In *Lusby* it is clear that the officer intended and purported to act as a police official within his jurisdiction, a substantially different situation than we have presently.

In *Davis v. Murphy*, 559 F.2d 559, 1098 (7th Cir. 1977), two off duty City of Milwaukee police officers and an off duty firefighter became involved in a dispute with racial overtones which resulted in the police officers' identifying themselves, displaying their badges and ultimately drawing their weapons. The plaintiffs were arrested and taken to jail. The police officers were carrying their

badges and guns and were on duty pursuant to a specific departmental regulation.

In *Howard Gault v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1980) there was an interlocking relationship between certain government attorneys and the Vegetable Growers Association. The Growers acted in concert with and through their attorneys who were public officials. These public officials utilized certain resources which would not have been available to other parties who had hired purely private attorneys. Similar cooperation resulted in finding of action under color of state law in *Dennis v. Sparks*, 449 U.S. 24 (1980).

Other cases have found that presence of a police officer or use of the police officer's badge gives rise to actions under color of state law; however, in each and every one of those instances, the police officer appeared, either wearing a uniform or flashing his badge, and identifying himself as a police officer and took certain actions within his own jurisdiction. See, e.g., *Lusby v. TG&Y*, supra; *Booker v. Atlanta*, 776 F.2d 274 (11th Cir. 1985).

In the case at bar, Whitt did nothing more than what a normal citizen, or for that matter, what a reporter could have done in a similar situation. He did not go to Pennsylvania clothed in any cachet authority, nor did he purport to be clothed in any authority. In fact, there is testimony that Whitt and Tice both told individuals that they were not on official business. The expenses of the trip were paid by Whitt. Tice and Whitt both received compensatory time, not straight pay, for their time which encompassed the portion of their 'side trip'.

Certainly, the First Amendment to the United States Constitution also gives certain rights to Dennis Whitt. He should be able to confront and respond to the allegations of his critics. In doing so in this case, Whitt did nothing more than rely upon public records and speak to people who were in the public domain. It is also noted that Frank Morgan was a publicly known figure, both in Florida and in the Schwenksville, Pennsylvania area. Whitt did not receive any material which was privileged, confidential or beyond the normal range of public scrutiny.

It is clear that the opinion of the Eleventh Circuit applied the appropriate prevailing law and its opinion is not in conflict with the opinions of this Court or the other circuits. For this reason, the petition for writ of certiorari should be denied.

POINT TWO

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEAL IS NOT IN CONFLICT WITH THE DECISIONS OF ANY FEDERAL APPELLATE COURTS, NOR DOES IT CONFLICT WITH THE FIRST OR SEVENTH AMENDMENT

Morgan was deemed by the court below to be a public figure. The record is clear that Mr. Morgan was not only a public figure in Lake Park, Florida, but had likewise been a public figure in Pennsylvania where he held elected office and had been actively involved in politics. It is clear that a public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964);

Harte-Hanks Communications, Inc. v. Connaughton, U.S. Supreme Court 88-10, June 22, 1989.

Further, the review by the Eleventh Circuit satisfies the guidelines set forth in *Harte-Hanks Communications, Inc. v. Connaughton*, supra. The Eleventh Circuit found "[t]he plaintiff made no effort to show that the comments made by Whitt were false". *Morgan v. Tice*, 862 F.2d 1495 at 1500.

This Court recently ruled that a reviewing court should conduct an independent review of the record to determine whether or not the requisite elements were proven. *Harte-Hanks Communications, Inc. v. Connaughton*, supra. The court below satisfied this approach. The court below reviewed the record and found that there was no proof regarding falsity of comments that were allegedly made, and thus the key element of actual malice was unsatisfied.

In *Bose Corporation v. Consumers Union of United States, Inc.*, 456 U.S. 45 (1984), this Court held that the record must be reviewed to determine whether or not evidence of actual malice exists and is supported by clear and convincing proof. Malice, which is necessary, goes beyond simple ill will. As aptly pointed out in *Bartimo v. Horsemen's Benevolent and Protective Association*, 771 F.2d 894 (5th Cir. 1985), there is a distinction between the ordinary understanding of malice and sense of ill will and the actual malice that is required under the *New York Times v. Sullivan, supra* decision. The Eleventh Circuit properly made this distinction. It is not enough to say that Whitt desired to find unsavory things regarding

Morgan's past. It must be shown that Whitt made statements which were known to be false or made with reckless disregard for falsity. Proof of this key element was totally lacking in plaintiff's claim.

Morgan, in his petition, claims that Whitt made numerous accusations that Morgan had been involved in arson. This simply is not the case. A close review of the record shows that comments made dealt with the fact that some properties owned by Morgan had mysteriously burned. Whitt did not say that Morgan had committed arson[2]. Further, in comments on Whitt's behalf indicating that he would like to lock up Morgan, simply do not satisfy the type of malice needed where the plaintiff is a public figure.

In reviewing the record it is clear that Morgan did not satisfy the requisite burden of proof at the trial court level and thus the decision of the Eleventh Circuit, which found no indication of falsity, was correct under the guidelines established in *Harte-Hanks Communications, Inc. v. Connaughton,* supra.

---

[2] Respondent points out to this court that there were several issues on appeal which were not reached by the Eleventh Circuit in their opinion. The Eleventh Circuit opinion rendered moot four of the arguments set forth by Whitt. Argument number six below dealt with exclusion of certain testimony of Francis Kuhn. Kuhn was Chief of Police of Schwenksville. The court below excluded testimony regarding the manner and method in which certain fire investigations were conducted in the State of Pennsylvania. It is clear that Whitt called Kuhn prior to the trip to Pennsylvania and the excluded testimony of Kuhn would have provided an explanation regarding Whitt's source of information.

Alternatively, petitioner argues that a different standard should be utilized in the case at bar. The petitioner claims throughout their petition that Morgan was nothing more than a citizen critic. This is clearly erroneous as Morgan was found by the trial court to be a public figure and had been actively involved in politics in the Town of Lake Park. Morgan was not simply a citizen critic, he was a political participant who solicited and ran persons for office, belonged to appointed boards and was very actively and vocally involved in politics. Moreover, the articles Morgan wrote about Mr. Whitt included analogies to Hitler's rise in Nazi Germany certainly go beyond the pale of a typical citizen critic. Mr. Morgan chose to be a public figure in the Town of Lake Park as he had chosen to be a public figure in the town of Schwenksville. This Court's denial of the petition will not signal a change in the scope of protection of the First Amendment. This Court's denial of the petition will simply allow the Eleventh Circuit's opinion, finding no showing of actual malice, to stand.

Moreover, this case does not draw a clear distinction between a citizen critic and a person who acts solely in his role as public official. In this case, Mr. Whitt exercised his right guaranteed by the First Amendment of free speech. He sought information on Mr. Morgan, information which was a matter of public record and *published* it in the same weekly newspaper in which Morgan had published his article.

The court below properly applied the guidelines which this Court has recently set forth in reviewing the case below. The court below found that the petitioner had not proven a case of actual malice nor did he make any

effort to show that the comments made by Whitt were in fact false. In essence, the actions of the Eleventh Circuit were in concert with the opinions of this Court and the petition for writ of certiorari should be denied.

POINT THREE

THE DECISION BELOW IS IN CONCERT WITH THIS COURT'S TITLE 42, SECTION 1983 POLICY CASES

The Eleventh Circuit below properly found that Whitt's actions did not amount to an execution of the Town of Lake Park's policy or custom. While Whitt may have been an executive of the Town, Whitt certainly did not set policy. Furthermore, Whitt's actions were, at most, an exercise of his own First Amendment right to respond to certain villifying articles written about him. Whitt did so in his own personal role and was not in any way promoting a policy of the Town of Lake Park.

This Court, in *Pembaur v. City of Cincinnati*, 475 U.S 469 (1986) establishes that official policy is a requirement for the attaching of liability to a municipality. It cannot be said that Whitt was acting in his official capacity nor can it be said that municipal policy was being executed or in any way carried out by Whitt's actions. The decision of the court below is not contrary to this Court's Section 1983 policy jurisprudence.

CONCLUSION

There is no conflict between the Eleventh Circuit ruling below and other applicable Section 1983 decisions rendered by this court or other federal courts. In this instance Whitt did not act as an official, the actions of Whitt were taken well beyond geographical limits of his authority, could not be considered as misuse of his authority, did not purport to be taken in his official capacity, and Whitt did not receive any special consideration.

The Eleventh Circuit review of the case below was proper, and after review of the record found that Morgan, a public figure, did not show clear, convincing evidence that Whitt made false and defamatory allegations with actual malice. The court below found that there had been no showing that the comments made by Whitt were false.

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(5)

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NO. 88-1921

In the Supreme Court of the United States

October Term, 1988

FRANK MORGAN,
Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, AND THE TOWN OF LAKE PARK, FLORIDA,
Respondents.

On Writ of Certiorari to the United United States Court of Appeals for the Eleventh Circuit

---

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STATEMENT OF THE CASE

Petitioner readopts by reference the Statement of the Case contained in his Petition for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

The conflicting statements of the facts contained in the Briefs in Opposition filed by Respondent Town of Lake Park and by Respondent Whitt demonstrate exactly why the Eleventh Circuit was wrong to open up the Record and give Respondents the impression that they had a right to de novo review on appeal. The reexamination and reargument of the facts, including credibility determinations urged in the Briefs for the Town and for Whitt, are better directed to the trial court in a motion for judgment n.o.v., or to the jury itself in a closing statement. The credibility determinations already made by the jury should

not be reargued to an appellate court. It was manifest error for the Court of Appeals in this case to substitute its own view of the facts.

Petitioner feels compelled, however, to point out in the body of the Argument several of the more egregious factual misstatements made by Respondents.

I. THIS COURT'S RECENT DECISION IN HARTE-HANKS COMMUNICATIONS V. CONNAUGHTON CONTROLS THE PETITION FOR CERTIORARI IN THIS CASE AND REQUIRES REVERSAL, OR REMAND TO THE ELEVENTH CIRCUIT.

Since the time Petitioner filed the petition in the instant case, this Court has decided Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 57 U.S.L.W. 4846 (1989). That case controls the instant Petition and requires reversal of the decision below, or, at least, remand to the Eleventh Circuit for reconsideration of its analysis in

light of the Connaughton Court's explanation of First Amendment appellate review.

Though the Town makes no mention of this decision, defendant Whitt acknowledges that Connaughton controls. Response to Petition 14 [hereinafter "Whitt Brief"]. He then wrongly asserts, however, that the Eleventh Circuit somehow complied with the newly announced Connaughton rule. In fact, just the opposite is true. In the instant case, the Court of Appeals reversed the jury's finding of actual malice and falsity even though the record contained ample evidence supporting the finding.

Moreover, the jury's finding was necessarily based on credibility calls; the jury must have believed plaintiff Morgan and disbelieved defendant Whitt. For example, the members of the jury be-

lieved the testimony of Lynn Nyce and others who said Whitt accused Morgan of arson, or "Jewish lightning;" they did not believe Whitt's disavowal (which his counsel are still repeating). The jury believed plaintiff Morgan's testimony that the investigation chilled his freedom of speech.

Finally, the jury ~~be~~lieved the witnesses who testified that the trip had been authorized by the Town Commission; the jury did not believe the self-serving disavowals of any knowledge of the trip. The Petition, and the Briefs of the Town and Whitt display quite well the array of evidence before the jury. The Petition stated that Lynn Nyce testified that Whitt called Morgan "a crook," and that Whitt said "We're going to get enough information on him to put his ass in jail." See Petition 5, and

source cited therein. The Town maintains that Lynn Nyce's testimony exonerated Whitt of any statements regarding arson, see Brief of Respondent Town 11 [hereinafter "Town Brief"]. However, not even Whitt himself so blatantly mischaracterizes Ms. Nyce's testimony; rather, Whitt admits that his insinuations led her to feel "that Morgan was a person that she did not want to know." Whitt Brief 4.

Yet the Eleventh Circuit rejected the jury's findings without discussing the record conflicts or the necessary credibility calls made by the jury, as required by Connaughton and Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). The jury necessarily found that Whitt deliberately set out to make Morgan pay -- by suffering a damaged reputation on unsupported and false allegations -- in

retaliation for Morgan's civic criticisms of Town Manager Whitt. The jury believed those witnesses who testified that Whitt continued to spread baseless accusations even after witness upon witness refused to corroborate them. Such actions constitute actual malice, and the jury so found. And it is the jury's role, not the Court of Appeals', to decide whether certain witnesses are to be believed.

This Court in Connaughton clarified that the jury still has the power to decide record conflicts and credit certain witnesses even in First Amendment cases. The petitioner in Connaughton argued that this Court, in Bose, had indeed rejected the trial court's credibility determination. But the Connaughton Court emphasized: "We disagree with this reading of Bose." 57 U.S.L.W. at 4855 n.35.

Instead, "credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses. . . .'" 57 U.S.L.W. at 4855, quoting Bose, 466 U.S. at 499-500.

Thus, it is now settled law that a reviewing court should credit those demeanor and credibility inferences which the jury must necessarily have drawn in reaching its verdict, and then compare those accepted findings "alongside the undisputed evidence," 57 U.S.L.W. at 4855, and only then reach an independent conclusion on the actual malice issue.

This Court found: "Accepting the jury's determination that petitioner's explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a

deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges." 57 U.S.L.W. at 4856. The parallel to Morgan's case is startling. Whitt similarly failed to seek information vindicating Morgan precisely because Whitt wanted to find a reason to "lock [Morgan's] ass up." Whitt deliberately failed to investigate many sources who would have cleared Morgan. And, even worse than in Connaughton, Whitt continued spreading lies about Morgan even after objective reliable sources, from law enforcement officials to bystanders, provided Whitt with no evidence whatsoever that Morgan had committed arson, or "Jewish lightning."

As in Connaughton, Whitt's continued spewing of bad information in the face of consistent credible denials --

here from third parties, not just Morgan -- necessarily adds up to subjective reckless disregard of the falsity of the allegations. This was not a mere failure to investigate, it was deliberate blinding to truth. "The purposeful avoidance of the truth is in a different category," 57 U.S.L.W. at 4856, and constitutes actual malice if the jury's credibility calls so require.

The Court of Appeals below did not employ this analysis. Rather, it came to its own conclusion on basic facts, inferences, and credibility calls. Its analysis stands contradictory to this Court's framework and application in Connaughton and to the position of other Circuits, as explained in the Petition. See Petition 25-31. Therefore, this Court should grant certiorari to reject the Eleventh Circuit's rule, or should

remand the case in order to allow the Eleventh Circuit to decide the case under a corrected view of its proper appellate role.

II. THE COURT OF APPEALS INCORRECTLY REVERSED THE JURY'S FINDING THAT WHITT ACTED "UNDER COLOR OF" LAW.

The determination of whether an act is taken "under color of" law is a "necessarily fact-bound inquiry." Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982). In the instant case, that issue was resolved against Respondents by the jury. That factual determination should have been respected by the Court of Appeals for the Eleventh Circuit, as it would have been in other circuits. Hence, the incomplete statement of the facts given by Respondents cannot undercut the jury's resolution of the factual issues.

For instance, the Town states that Tice showed his identification only at the request of third parties. See Town Brief 8. Not even Whitt agrees with this characterization; rather, Whitt himself concedes that he told Tice to show his police identification. See Whitt Brief 4. A full report of Tice's statement is provided in the Petition, at 3, 15, and 48.

The evidence before the jury established that Whitt repeatedly bandied about the indicia of his office, including his official business cards. In its finding that Whitt acted "under color of" law, the jury -- like those persons in Pennsylvania visited by Whitt -- found the presence of a Town Police officer, whom Whitt had instructed to show his police identification, to have been significant.

The Eleventh Circuit's outright reversal of this finding by the jury, a finding well-supported by the evidence, amounts to nothing more than an appellate court's usurpation of the function of the Finder of Fact -- in this case, a jury.

In an attempt to distinguish the great weight of authority against their position, see Petition 10-24, Respondents introduce a novel distinction between public officials who act "under color of" law when off-duty within their geographic area, and those who exercise official powers (including the display of indicia of their offices) in a separate geographic area. Town Brief 15-17; Whitt Brief 11-12. Respondents cite no direct support for such a novel distinction, nor could they. Petitioner is unable to locate any case which has made a

distinction between legal jurisdiction and physical jurisdiction for purposes of "under color of" law analysis. Under Respondents' unprecedented approach, no liability could attach where a Town Manager who, while conducting an investigation outside his physical jurisdiction, physically harmed those who failed to provide the information he sought. The distinction urged by Respondents would lead to absurd results. An off-duty police officer who abuses his discretion in his geographic area would be acting "under color of" law, but the same officer would not be acting "under color of" law if, while on-duty and engaged in hot pursuit in a neighboring jurisdiction, he were to shoot an unarmed, suspected misdemeanant fleeing from him. Cf. Tennessee v. Garner, 471 U.S. 1 (1985).

The Town also avers that Petitioner has previously not raised the issue of subterfuge. See Town Brief 4 n.2. A reading of the opening statement by Petitioner's counsel belies that:

> In that capacity, you will hear that on what was a legitimate trip to Syracuse, in which he [Whitt] took Sergeant Tice, an individual the defendant will say is a good honest officer of the Town of Lake Park Police Department, he took him up to Syracuse to do some legitimate business.
>
> However, they didn't fly from West Palm Beach straight to Syracuse and back. There was a secret agenda to this trip that was a personal vendetta, which Defendant Whitt had against Morgan.

R5-10 (opening statement for plaintiff) (emphasis added). Far from being a concession, the initial paragraph could fairly have been taken by the jury to be a prediction by Petitioner's counsel of what the Defendants would assert. The second paragraph clearly laid out the possibility of subterfuge, which the

jury apparently believed to be the situation. Indeed, the jury heard the testimony of Tice that he believed the trip to Syracuse to have been unnecessary. See Petition 2 n.1 and sources cited therein.

III. THE COURT OF APPEALS INCORRECTLY REVERSED THE JURY'S FINDING THAT WHITT'S ACTIONS CONSTITUTED A POLICY OF THE TOWN OF LAKE PARK.

In the instant case, the trial court correctly identified Whitt as a policymaking official. See App. 47 (jury charge). The Eleventh Circuit, however, totally disregarded the district court's legal determination. In so doing, the Eleventh Circuit incorrectly merged into a meaningless mass the distinctly separate issues of "policy" and "under color of" law. See Petition 17-18.

As this Court recently reiterated, "[o]nce those officials who have the

power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue." Jett v. Dallas Independent School District, 109 S.Ct 2702, 57 U.S.L.W. 4858, 4868 (1989), citing Monell v. Department of Social Services, 436 U.S. 658, 661 n.2 (1978) (underlined emphasis in original; bold emphasis added). This is precisely what the district court did in the instant case.

Respondents engage in a futile attempt to downplay the damning evidence utilized by the jury to make its ultimate finding of causation. For example, the Town claims that the judge at trial ruled the existence of the additional airfare to have been "irrelevant to the issue of municipal liability." Town

Brief 23 n.5. That claim is patently wrong. The judge allowed the jury to hear the testimony of the Delta records supervisor regarding the difference in the fares. R6 - 174-81. Furthermore, the language quoted by the Town is the judge's response to an objection made by Petitioner's counsel to the Town's questioning of Whitt as to whether he knew the price differential before his trip. R6 - 515-16. Of course, whether Whitt knew in advance of the differential is a very different issue from whether the Town ratified his action by afterwards paying for the additional airfare. See Petition 2-3, 14-15, 44-45, 48, and 51-53.

Respondents make the basic error of claiming that no "policy" of the Town was demonstrated. See Whitt Brief 17; Town Brief 22. This Court has been

quite clear, however, that "the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers." Pembaur v. Cincinnati, 475 U.S. 469, 483 n.11 (1986). See Oklahoma City v. Tuttle, 471 U.S. 808, 822 (1985) (plurality); id. at 832 (Brennan, J., concurring). In such situations, the decisions of the highest policymakers constitute the "policy," whether or not that policy is contained in an ordinance, personnel manual, or operations guidelines.

Here, Whitt -- the chief administrative and law enforcement officer of the Town of Lake Park -- designed and carried out the Town's of conducting an intrusive investigation into the background of someone who chose to criticize the governance of the Town.

CONCLUSION

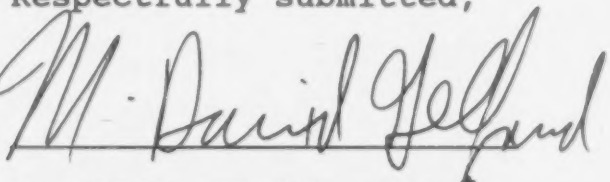
Respondents argue their case by relying upon a set of "facts" never found by the jury in this case. The continuing attempts by Respondents well illustrate the danger posed by an appellate court's interfering with a well-considered jury verdict based, in large part, on credibility determinations.

But for the interference of the Court of Appeals in this case, this Court would not now be faced with the task urged upon it by Respondents -- to delve into each page of a cold Record, and to decide which witnesses to believe and which to disbelieve solely upon the printed word.

If the decision of the Court of Appeals were allowed to stand, as Respondents have urged, this Court and the Courts of Appeals will soon, and fre-

quently, be called upon to act as the thirteenth juror. This Court should reverse the decision of the Eleventh Circuit, and reinstate the judgment of the district court based upon reasonable jury verdicts. Alternatively, this Court should remand this case to the Court of Appeals for reconsideration in light of Connaughton.

Respectfully submitted,

By: 

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